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THE FOREIGN SERVICE
OF THE
UNITED STATES OF AMERICA

DEPARTMENT OF STATE A/CDC/MR
REVIEWED BY Jattaway DATE 3/19/82
RDC ☐ or XEC ☐ EXT. DATE
AUTH. REASON(S)
EXCISE EXCISIONS ☐
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MEMORANDUM OF CONVERSATION

Subject: Discussions on the Draft Treaty of Friendship, Commerce and Navigation between Japan and the United States.

Participants: For the Ministry of Foreign Affairs:

Mr. Takio Oda, Director, Economic Affairs Bureau
Mr. Kenichi Otabe, Vice Director, Economic Affairs Bureau
Mr. Haruki Mori, First Secretary, Economic Affairs Bureau
Mr. Satoru Takahashi, Chief, First Section, Treaties Bureau
Mr. Atsushi Uyama, Chief, First Section, Economic Affairs Bureau

For the American Embassy, Tokyo:

Dr. Frank A. Waring, Counselor of Embassy for Economic Affairs
Dr. W. W. Diehl, Financial Attache
Mr. Jules Bassin, Legal Attache
Mr. Dudley G. Singer, Commercial Attache
Mr. Robert W. Adams, Second Secretary

Place: Ministry of Foreign Affairs, Tokyo, Japan.

Date: October 15, 1952 to March 11, 1953.

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At the

At the opening meeting of the final round of informal discussions on the proposed Treaty of Friendship, Commerce and Navigation between Japan and the United States, Mr. Oda greeted Dr. Waring and the United States representatives, making the following statement:

"I am very glad that we are nowsable to have the second round of informal discussions concerning the proposed Treaty of Friendship, Commerce and Navigation between the United States and Japan. It is ardently dosired by the Japanese representatives that the present course of informal discussions will be completed as soon as possible so that the matter may be placed at the disposal of the formal negotiations, thereby enabling the earliest possible conclusion of the proposed treaty between the two countries.

"From this viewpoint, I should like to offer you a set of proposals for expediting the proceedings of the present informal discussions. The papers prepared by the Japanese representatives consist roughly of two parts, namely, one part designed to secure the confirmation of the understanding reached in the course of the preceding conversations, and a second part making new proposals. The former includes the items which have been already discussed during the first round of informal discussions, but as to the interpretation thereof as given by the American representatives some doubts have been entertained by the Japanese representatives as a result of further examination subsequently made; also included are the items which have been discussed and referred to the Department of State for consideration, concerning which we are desirous of being informed of the developments of such inquiries. I hope that a thorough discussion will be given to these points during the present conversations so that we may have only to confirm the results of these discussions in the formal negotiations.

"Secondly, with respect to the proposals by the Japanese representatives, some are technical but others might prove to be negotiating points. As to the technical issues, I hope they are discussed exhaustively in the present conversations so that we may have only to confirm the results of discussion in the formal negotiations. As to the negotiating points, I hope that in the present stage of conversations, both groups direct their main effort clearly to understand what is exactly the position of the other party and to leave the final settlement of the problems to the negotiations. As stated at the outset, in offering the present proposals the Japanese representatives are motivated solely by an ardent desire for the earliest possible conclusion of the proposed treaty."

Dr. Waring

Dr. Waring replied that the Embassy shared the desire of the Government of Japan that these discussions be expedited and it was hoped the various pending problems would soon be resolved to the satisfaction of both Parties. Dr. Waring made the following additional remarks:

"I need not say that we are discussing with you a very important document - important because it will serve as the basis and guide for the future conduct of commercial relations between our two countries. This Treaty may well be of special significance to your Government, since it may serve as the pattern of your future negotiations with other countries. With you, I am desirous that we should move forward as rapidly as possible. I am most appreciative of the work which is represented by the documents you have given us, and assure you that we will study them carefully and with greatest sympathy.

"There have been two previous series of conversation between us. The first of these was largely explanatory, during which we attempted to set forth for your representatives what was intended in the draft submitted for your consideration. That draft represents the cumulative experience of the United States in the preparation of similar treaties over a considerable period of years. The second series of discussions enabled us to understand the problems which were in your mind regarding some of the points raised. As you know, we kept careful minutes of these later discussions which were submitted, after approval by both groups, to the Department of State for its consideration. We have had replies from the Department on the points in question, and in many instances it has indicated its readiness to accept, without question, the views of the Japanese Government. In a few cases, the Japanese proposals were acceptable in principle, but the Department of State has suggested minor changes in phraseology for the sake of clarity. I believe that a few topics are basic and fundamental for future negotiation. In considering those issues on which the Department of State has agreed to meet your point or in which you have agreed with our position, I believe there is little need for discussion. When there is some problem concerning which we can accept your point of view in principle, but wish to suggest different phraseology, I suggest that we consider such phraseology briefly and then appoint a subcommittee to explore the difference and report to us. This, I think, will save time for the group as a whole. If these suggestions meet with your approval, I believe we can expedite these discussions."

Mr. Oda

Mr. Oda replied that such a procedure was satisfactory, and suggested that the position papers prepared by the Government of Japan should be the basis of the current discussions. It was further agreed that the present memorandum of conversation should summarize all the meetings of the second, or review, round of informal discussions, and that comments concerning each of the various articles of the draft Treaty be combined and reported under a single heading for each article rather than in chronological sequence.

PREAMBLE

Mr. Oda stated that if the amendments to the Preamble proposed by the Japanese representatives and provisionally accepted by the American group during the previous informal discussions, were formally accepted by the Government of the United States, agreement could be reached concerning the Preamble. He added that the Japanese proposals were as follows:

"(1) To amend that part of the sentence reading 'by arrangements encouraging mutually beneficial investments, promoting mutually advantageous commercial intercourse' to read 'by arrangements promoting mutually advantageous commercial intercourse, encouraging mutually beneficial investments'; and

"(2) To delete the word 'otherwise' from that part of the sentence reading 'and otherwise establishing mutual rights and privileges. . .'"

Dr. Waring replied that the two revisions proposed by the Japanese representatives were agreeable to the United States. Mr. Oda then stated that, under the Constitution of Japan, neither the Prime Minister nor any other Government official has the right to appoint a Plenipotentiary to conclude a Treaty of this nature, such right being reserved to the Cabinet. He added that it was therefore necessary that "Japan" or the "Government of Japan" be employed in the Preamble rather than a personal designation such as that of "The President of the United States" as written in the draft Treaty. Dr. Waring proposed that the terms "The United States of America" and "Japan" be utilized to overcome the technical difficulty raised by Mr. Oda. This suggestion was accepted by Mr. Oda, and it was agreed that the Preamble, as amended, was acceptable to both parties.

(ARTICLE I)
(Article I of the original draft, subsequently deleted.)

Mr. Mori read the following statement on the position of the Government of Japan in connection with Article I:

"1. The United States representatives have given the reasons below for inserting the 'equitable treatment' clause in

Article

Article I: (1) 'it (Article I) suggests that where two constructions of the FCN Treaty's provisions are equally possible in a given instance, the construction leading to an equitable - or just - result is to be preferred'; (2) 'it serves as a guiding principle in cases where the exact terms of the Treaty's provisions do not afford complete and definitive guidance'; and (3) 'it provides a guiding principle of justice under which more specific standards of national and MFN treatment are applied'.

"However, with reference to item (2), above, a like provision is already included in paragraph 4, Article VI and in paragraph 2, Article XVII of the draft Treaty with reference to investments and state trading, respectively. Therefore, it is the belief of the Government of Japan that it is not necessary to include a similar provision in Article I. With reference to items (1) and (3), above, it is believed by the Japanese representatives that, in order to achieve the twofold purposes stated above, it is most appropriate to insert an interpretative provision in Article XXIV. It is proposed, therefore, that the following provision be stipulated in Article XXIV as paragraph 1:

"'1. Each Party shall apply the provisions of the present Treaty in the spirit of assuring equitable treatment to the persons of nationals, and to the property, enterprises and other interests of nationals and companies of the other Party.'"

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Dr. Waring replied that the Department of State considers this general provision desirable as a standard proposition which introduces the Treaty and sets forth the spirit of the articles which follow. The insertion of such a clause in one of the concluding articles of the Treaty was therefore regarded as unnecessary by the Department of State, and it would prefer that Article I be deleted altogether if the Government of Japan found it difficult to accept. Mr. Oda then withdrew the Japanese proposal concerning an additional paragraph in Article XXIV, and agreed that Article I should be deleted from the draft Treaty.

ARTICLE I
(Previously Article II
of the original draft.)

Mr. Mori read the following statement with reference to the opinion of the Government of Japan on Article II, now designated as Article I of the draft Treaty in view of the deletion of the Article previously bearing this number: "In view of the enactment of the McCarran-Walter Act (Immigration and Nationality Act), the Japanese

representatives

representatives withdraw the proposal that most-favored-nation treatment be extended to all the matters prescribed in paragraph 1. With respect to 'related commercial activities', the American representatives gave the explanation that 'individuals engaging in the activities covered by Article VII, paragraph 1, and Article VIII, paragraph 1, are entitled to enter the territories of the other Party under the provisions of Article II (now Article I), paragraph 1 (a).' Is the latter statement correct? It also seems that, according to the amended law, the scope of 'treaty traders' has been expanded by the addition of a new category of 'treaty investors'. The opinion of the American representatives is requested on this point because, even if the types of activities permitted under Articles VII and VIII are provided for broadly, it might be necessary for the Japanese representatives to re-examine this matter in the event entry for such purposes is not guaranteed.

Mr. Adams replied that the previous explanation given by the United States representatives in connection with "treaty traders" (i.e., that "individuals engaging in the activities covered by Articles VII, paragraph 1, and VIII, paragraph 1, are entitled to enter ... under the provisions of Article II, paragraph 1 a ", as contained in the Memorandum of Conversation of the Second Informal Meeting, February 27, 1952) was in error. He stated that the phrase "related commercial activities" in paragraph 1 (a) means solely such activities as are necessarily incidental and proper to the major purpose of that subparagraph, namely, the carrying on of international trade between the territories of the two signatories. The "treaty trader" visa issued by the United States is not granted to aliens who wish to engage in domestic commercial, industrial or financial activities. The reference to "related commercial activities" was included simply to indicate the liberal interpretation to be given to paragraph 1 (a), within its proper scope, rather than to enlarge its scope. The "related commercial activities" are those which must be carried on as an integral element of the international trade visualized. For example, a person engaged in the import-export business would presumably be entitled to maintain wholesale purchasing, assembling and distribution facilities, and warehouses, essential to the successful conduct of his business. It would not follow, on the other hand, that a person could obtain a "treaty trader" visa for the purpose of operating a retail store.

Dr. Waring then stated that the correction of previous remarks entered in the record by Mr. Adams appeared to resolve the question raised by Mr. Mori. In connection with the reference to "treaty investors" made in the statement of the Japanese representatives, Dr. Waring mentioned the informal memorandum previously handed to Mr. Oda, which stated in part:

"(1) Pursuant to Section 101 (a) (15) E (ii) of the omnibus immigration act now finally enacted into law, the Department

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of State offers the following new clause for insertion in Article II (new Article I), paragraph 1:

> 'For the purpose of developing and directing the operations of an enterprise in which they have invested, or in which they are actively in the process of investing, a substantial amount of capital;'

"This would be placed immediately following clause (a). It would be labeled '(b)' and present clause (b) would become '(c)'.

"With this clause, the Treaty, in addition to providing for 'treaty traders', would provide for the non-quota entry of so-called 'treaty investors' and for their indefinite sojourn so long as they remain in that status. The wording of the new provision, like that of the 'treaty traders' clause, follows closely the language of the immigration act. Regulations to govern the issuance of this new class of visa have not yet been promulgated (the act does not go into final effect until 6 months after enactment); but presumably they will be comparable with those relating to the present 3 (6) visa (the so-called 'treaty trader' visa)."

Mr. Oda replied that he saw no objection to the inclusion of the above-mentioned clause concerning "treaty investors" as paragraph (b) of this Article, and stated that it should be inserted pending formal approval by the Government of Japan. At a subsequent meeting, Mr. Oda confirmed his acceptance of the newly proposed provision, and it was then agreed that Article I was acceptable to both parties.

ARTICLE II

Mr. Mori read the following statement on the position of the Government of Japan on paragraph 1, Article II:

"(1) Concerning the international law standard, it is the view of the Japanese representatives that, under the current Japanese legislation and juridical system, the according of protection and security on equal basis with Japanese nationals is considered to be sufficient. Moreover, since the Japanese Constitution extends equal treatment to both its own nationals and aliens with respect to personal protection and security, the Japanese representatives would like to avoid the use of the term 'international law' standard, which implies a treatment more favorable than national treatment. Therefore, it is proposed that the 'international law' standard be deleted and either of the following formulas adopted:

> "(a) To guarantee national treatment with respect to personal protection and security as

was

was proposed by the Japanese representatives during the previous informal discussions. (This formula is in line with the United States-Uruguay Treaty, Article II, paragraph 1, and United States-Colombia Treaty, Article III, paragraph 1.)

"(b) To provide no specific standard of treatment with respect to personal protection and security as in the case of United States-Greece Treaty, Article IV, paragraph 1."

Dr. Waring replied that the fact that both Japan and the United States have an enlightened system of law and justice made it easier and more appropriate for them jointly to subscribe to the international law minimum, and thus make a further contribution to the maintenance of international law. Treaties of the type under consideration were important as precedents, he added, and the principles agreed to by leading nations could have a favorable influence on the content of their treaties with others. Dr. Waring observed that both parties realized, of course, that in certain countries the "national treatment" standard was altogether inadequate, but he assured Mr. Oda that the inclusion of the concept of international law in the present Treaty carried absolutely no implication that such inadequacy was any more applicable to Japan than to the United States.

Mr. Mori then stated that the Government of Japan wished to revise the phrase in paragraph 1, now reading "shall be free from molestations of every kind", to read "shall be free from unlawful molestations of every kind".

Dr. Waring replied that the Department of State accepted the proposed insertion of the word "unlawful". He added that the Department was of the opinion that this adjective was unnecessary in the English language, but that it did not object to its insertion if this were helpful to the Government of Japan. The Department of State also pointed out that the intent and meaning of the provision was the same, whether or not the adjective "unlawful" was inserted, and that it was understood that this additional word was to be interpreted in its broadest sense, to cover actions contrary to either municipal or international law.

Mr. Mori replied that, with the insertion of the word "unlawful", the intent and meaning of this provision remained the same.

Mr. Mori then continued with the presentation of the Japanese position on Article II as follows:

"With respect to paragraph 2, the Japanese proposal to amend 'is taken into custody' to read 'is accused of crime and taken into custody' is withdrawn. However, it is

understood

understood that the provisions of paragraph 2 (a) and (d) apply to both criminal and administrative cases, while the provisions of 2 (b) and 2 (c) apply only to criminal cases. It is requested that the foregoing understanding be confirmed.

"With respect to the interpretation and application of paragraph 2 of Article II: (a) The American representatives explained during the previous informal discussions that the phrase 'be immediately notified' was understood to mean appropriate notification at the earliest possible and practicable moment. Confirmation is requested on the above interpretation. (b) In the application of the phrase 'be immediately notified', as interpreted above, it is understood by the Japanese representatives that the following measures duly satisfy the requirement of immediate notification: firstly, notification may be made in the Japanese language, and secondly, notification is required only when the time of custody exceeds a 'reasonable time'. The term 'reasonable time' is understood by the Japanese representatives to mean approximately 12 hours."

Dr. Waring referred to a previous conversation (Second Informal Meeting, February 27, 1952), in which the United States representatives stated that "the provisions of 2 (a) of Article III (now Article II) applied to both administrative and criminal cases, and that the provisions of 2 (b) and (c) applied only to criminal cases" and, further, that "2 (d) . . . applied to criminal cases in which a person is in custody and entitled to proper counsel, as for example, in deportation proceedings". In view of this statement, Dr. Waring stated that he believed the present observation of the Japanese representatives was generally correct.

Dr. Waring then confirmed the previous informal agreement that the phrase "be immediately notified" was understood to mean "appropriate notification at the earliest possible and practicable moment". He further agreed with the interpretation of the Japanese representatives that such notification might be made in the Japanese language.

With respect to the period of approximately 12 hours as a "reasonable time" before which notification would be made, Dr. Waring stated that this was inconsistent with the general understanding, and that a person in custody had the right to communicate with his consular representative immediately upon arrest if he so desired.

Mr. Bassin then inquired whether the Japanese representatives had any objection to the change recently made by the Department of State in its standard draft, and proposed for inclusion in the present Treaty, to the effect that the final phrase of this Article should read: "Including the services of competent counsel of his choice".

Mr. Oda

Mr. Oda stated that the additional phrase "of his choice" was acceptable to the Japanese representatives. At a subsequent meeting Mr. Oda observed that the Ministry of Foreign Affairs, after further consideration, had withdrawn its proposal that the "international law " standard be deleted; he added that the Japanese representatives also withdrew their suggestion that a "reasonable time" for notification of arrest be specified as 12 hours. Mr. Oda suggested, however, that the phrase in paragraph 2, "be immediately notified", be amended to read "as soon as possible" or "at the earliest practicable moment".

Dr. Waring replied that, in his opinion, the terms suggested were not sufficiently precise for use in the Treaty and proposed that paragraph 2 be left unchanged. He added that the formal minutes of the discussions already included the statement by the United States representatives that immediate notification was understood to mean appropriate notification at the earliest possible and practicable moment.

It was then agreed that Article II, as revised, was acceptable to both the Japanese and United States representatives.

ARTICLE III

Mr. Mori read the following statement with respect to Article III: "The Article is acceptable without change. However, confirmation is requested of the following interpretations on several technical points: (1) Does the term 'loss' in paragraph 2 include 'partial loss' (e.g., reduction in pay due to reduced efficiency because of the loss of a finger although the injured remains employed)? (2) Does 'disability' as mentioned in paragraph 2 include cases where a person becomes unable to work due to childbirth? (3) There might arise cases when a Japanese or an American national who has legal right within the country of the other, returns to his own country and is not able duly to establish his rights because he cannot produce the necessary documents, et cetera (e.g., certificate of death of the person on whom his support had depended issued by the Mayor of the City or Head of the town or village concerned). How is such a case treated in the United States?"

Dr. Waring replied that Article III was concerned with the extension of national treatment under the labor laws of either country and not with an interpretation of the laws themselves. He added that it was difficult to make any definitive reply on these specific points from the United States viewpoint, since cases of the types mentioned would in most instances involve legal decisions under a variety of state laws and regulations. With respect to "partial loss", Dr. Waring stated, an employee drawing disability compensation might well remain employed in the same enterprise but in a different capacity and at a lower salary. In some cases, the combined total of an employee's

disability

disability compensation and his reduced salary might be lower than his previous wages. He added that compensation during temporary unemployment caused by pregnancy and childbirth was provided in some labor contracts, particularly those negotiated by the more progressive unions; in other cases, the union itself might, in lieu of protection under a contract, assist the employee during temporary unemployment caused by pregnancy. There are no United States Federal laws, however, which provide for such compensation. With reference to the presentation of necessary documents, Dr. Waring stated that these would have to be submitted if so required, but that he believed it was not too difficult in either Japan or the United States to secure official statements or certificates of the types mentioned by Mr. Mori, nor to have these translated and authenticated before an appropriate consular representative.

At a subsequent meeting, and after further consideration of the various points discussed above, Mr. Oda stated that Article III of the draft Treaty was acceptable to the Government of Japan.

ARTICLE IV

Mr. Mori read the following statement on the position of the Government of Japan with reference to paragraph 1, Article IV: "The word 'domestication' is difficult to translate properly into Japanese. Therefore, could the phrase 'without any requirement of registration or domestication' be amended to read 'without registration or other similar requirement'?"

Mr. Bassin referred to a definition previously given by the United States representatives for the word "domestication" (Memorandum of Conversation, Third Informal Meeting, February 29, 1952). He pointed out that "domestication" and "registration" were not similar procedures and, therefore, that an amendment reading "without registration or similar requirements" might be regarded as incomplete. At a subsequent meeting Dr. Waring stated that he realized translation difficulties might arise in the preparation of the Japanese text of the Treaty, and he had therefore communicated the Japanese proposal to the Department of State. He added that the Department was willing to amend the phrase "registration or domestication" to read "registration or similar requirements", provided it was understood that no change in substance is involved. The Department of State also suggested that the phrase in paragraph 1, "any requirement of", should be deleted for reasons of style, thus making the concluding clause of this paragraph read as follows: "shall enjoy such access therein without registration or similar requirements". Mr. Oda stated that this was acceptable to the Japanese representatives.

Mr. Mori then continued with his presentation of the views of the Government of Japan on paragraph 2, Article IV, as follows:

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"With respect to enforcement of arbitration awards mentioned in paragraph 2, the Japanese representatives take the position that such awards duly rendered should be enforceable in a positive manner. Therefore, it is proposed that the provision of paragraph 2, Article VI of the United States-Greece Treaty be taken in toto and substituted for the present paragraph."

Dr. Waring replied that the various questions previously raised by the Japanese representatives in connection with paragraph 2 (Third Informal Meeting, February 29, 1952) had been carefully considered by the Department of State, and that the Department had suggested that these questions might be resolved if this paragraph were deleted and the pertinent paragraph of the United States Treaty with Greece used in its stead. It was then agreed that paragraph 2 would be replaced in toto by the paragraph on arbitration awards contained in the United States Treaty with Greece (paragraph 2, Article VI).

Mr. More then read the following statement on the position of the Government of Japan with reference to the newly revised paragraph 2 of Article IV:

"The phraseology, 'Awards . . which are final and enforceable', in the second sentence is interpreted by the Japanese representatives to mean awards which are capable of being enforced, and that it is therefore not required to obtain judgment of execution at the place where the awards were rendered to make the awards 'enforceable'."

Mr. Bassin confirmed the understanding of the Japanese representatives.

It was then agreed that Article IV, with the amendment of paragraph 2, as discussed above, was acceptable to both the Japanese and United States representatives.

ARTICLE V

Mr. Oda asked for confirmation of his understanding that the Japanese proposal to omit paragraph 4 from Article VI, and make this paragraph a separate and independent Article, was acceptable to the Department of State. Dr. Waring replied that this proposal had been accepted, and he proposed that the paragraph in question be designated as Article V of the draft Treaty.

Mr. Oda then suggested two changes in the newly inserted Article, as follows: (1) The addition of that clause contained in the Treaty of Friendship, Commerce and Navigation between Uruguay and the United States which reads, "neither Party shall without appropriate reason deny opportunities and facilities for the investment of capital by

nationals

nationals and companies of the other Party"; and (2) the deletion of the words "arts and technology" in the concluding phrase of this Article and the substitution therefor of the words "modern techniques and equipment".

Dr. Waring replied that the additional clause in the Treaty with Uruguay had been regarded as necessary in that particular Treaty because of other departures from the standard draft of the Department of State. He added that in his opinion this phrase pertained to matters not germane to Article V, but rather subject to provisions already contained in Article VII and other Articles. Pointing out that the words "arts and technology" had occurred earlier in Article V, Dr. Waring stated that the change to "modern techniques and equipment" in the concluding clause, as suggested by the Japanese representatives, might cause some confusion. He added that the concept suggested in the Japanese proposal was included in the term "arts and technology", and proposed that this phrase remain unchanged.

Dr. Waring then stated that, for reasons of clarity and style, the Department of State had suggested that the phrase, "in the enterprises which they have established or in the capital, skills, arts or technology which they have supplied", be amended to read, "in the enterprises which they have established, in their capital, or in the skills, arts or technology which they have supplied". Mr. Oda replied that this revision was acceptable to the Government of Japan and that, after consideration of the points raised by Dr. Waring, the Japanese representatives withdrew the two proposals (1) and (2), above, they had previously made.

Mr. Oda then stated that the subject matter of paragraph 2, Article X of the draft Treaty appeared to be such as to warrant inclusion in Article V rather than in Article X. He proposed therefore that the paragraph in question be deleted from the latter Article and inserted as paragraph 2, Article V. Dr. Waring replied that this change was acceptable to the American representatives. It was then agreed that, with the revision of the first paragraph, as mentioned above, and the inclusion of the new paragraph 2, this Article was acceptable to both parties.

ARTICLE VI

Mr. Mori read the following statement concerning the position of the Government of Japan on paragraph 2, Article VI, as follows:

> "It is understood that there is no objection by the American representatives to the Japanese proposal that paragraph 2, now reading in part '. . . shall not be subject to molestation or to entry without just cause', be amended to read '. . . shall not be subject to unlawful entry or molestation'."

Dr. Waring

Dr. Waring replied that the revision proposed by the Japanese representatives was acceptable to the United States.

Mr. Mori continued with the statement of his Government's position with respect to paragraph 3, as follows:

"(1) It is provided under Japanese law that, in the event the owner of an immovable property (e.g., a residence or other building) located on land which is taken for a public purpose desires that the said property be moved to some other land by the authorities concerned, it shall be so done without any expense on the part of the owner, if his desire is considered reasonable. It is understood by the Japanese representatives that such form of compensation (compensation in service) is included in 'compensation in kind'.

"(2) With respect to compensation for farm lands subject to compulsory sale to the Japanese Government under the 'Farm Land Law", it is understood that such compensation may be determined on the basis of similar compensation for farm, pasture, and other lands taken under the Law Concerning the Special Measures for the Establishment of Owner Farmer (Agrarian Land Reform Law). Accordingly, it is proposed that a reservation be entered in the Protocol in clarification of this understanding."

With reference to the first point raised by Mr. Mori, Dr. Waring observed that "compensation in service" of the type described would be considered as "compensation in kind", within the terms of paragraph 3, provided, of course, there was no departure from the principle of just compensation representing the full equivalent of the property taken. Dr. Waring added that it was inappropriate, however, to consider so general a statement as conclusive, inasmuch as individual problems could arise where "compensation in kind" or "compensation in service", or both, might not truly represent full and just compensation.

In connection with the second point raised by Mr. Mori, Dr. Waring replied that a Government would naturally wish to protect its citizens abroad in two ways: First, by ensuring that they would not suffer under any discriminatory application of such a land reform program, and secondly, that the amount of compensation for lands taken under such a program bear a reasonable relationship to the value of the land. He added that paragraph 4 of Article VI prescribed a standard of treatment in this connection which he believed adequately safeguarded the interests of nationals of the United States and was doubtlessly acceptable to Japan. Dr. Waring stated that he did not believe therefore that a protocol provision was necessary.

Mr. Mori stated that no discrimination against United States nationals was intended and that compensation for agricultural lands

taken

taken by the Government under the land reform program was regulated by law applicable to all landowners of whatever nationality. At a subsequent meeting, and after consultation with the Ministry of Agriculture, Mr. Mori stated that it was agreed there was no need for a provision in the protocol along the lines previously suggested.

Dr. Waring then confirmed the statement previously made by the United States representatives that it was acceptable to revise the phrase in paragraph 2 of the standard draft reading, "shall not be subject to molestation or to entry without just cause", to that proposed by the Government of Japan, as follows: "shall not be subject to unlawful entry or molestation".

Mr. Mori then stated that, with respect to paragraph 4, Article VI the previous proposal to revise the final sentence was withdrawan by the Japanese representatives. In connection with paragraphs 3 and 4, Mr. Mori raised the following question: "Is the term 'taking' as used in paragraph 3 interpreted to cover such cases as the 'taking of privately owned enterprises into public ownership and to the placing of such enterprises under public control' as provided in paragraph 4?"

Mr. Bassin replied that the word "taken" (as used in paragraph 3) was synonymous with the expression used in paragraph 4.

It was then agreed that, with the revisions on which mutual assent has been expressed, as indicated above, Article VI was now acceptable to both the Japanese and American representatives.

ARTICLE VII

Mr. Oda stated that, with reference to clause (b) of paragraph 1, Article VII, the Japanese representatives believed that the right to organize companies under the general company laws of the other party and to acquire majority interests in companies of the other party should be extended on the basis of most-favored-nation, rather than national, treatment. Accordingly, Mr. Oda suggested that this clause be rephrased to indicate that most-favored-nation treatment was intended, or, alternatively, that the phrase "general company laws" be so qualified as to acknowledge the existence of certain permissible restrictions on alien ownership.

Dr. Waring replied that such an interpretation was not acceptable to the American representatives, and that he was of the opinion that clause (b), paragraph 1, clearly went beyond most-favored-nation treatment, if this were less favorable than national treatment. He added that the Department of State intends that clause (b) establish an effective right amounting to national treatment in principle, subject to the two major qualifications contained in later passages (paragraph 2 and 3) of this Article.

Mr. Oda

Mr. Oda replied that further consideration would be given this matter and that discussions could be resumed in this connection at a later date.

Dr. Waring suggested that the phrase "financial and other activity for profit (business activities)" in the opening clause of paragraph 1 be amended, for reasons of uniformity of style, to read as follows: "financial and other business activities". Mr. Oda replied that this revision was acceptable.

Mr. Oda then proposed that the following business activities be added to those set forth in paragraph 2 as reserved fields concerning which each party reserves the right to limit alien participation: (a) public utilities, including the manufacture or distribution of electricity, gas and water; (b) shipbuilding; (c) railway transportation and long-distance transportation services by bus and truck; (d) brokerage of commodities and securities; (e) emigration agents; (f) other activities which may be specified by mutual agreement. In connection with "emigration agents", Mr. Oda explained that the term meant Government-approved agents who arrange for the emigration of groups of Japanese nationals wishing to establish themselves in other countries, and that, because of the importance of such activities to the Government and to the emigrants, whose welfare was a matter of concern to the Government, regulations had been passed stipulating that such "emigration agents" must be of Japanese nationality, Mr. Oda also suggested that the present reservation concerning "banking involving depository or fiduciary functions" be expanded to read "banking involving depository, fiduciary or loan functions".

Dr. Waring replied that the reservation concerning the depository or fiduciary functions of a bank were appropriate, inasmuch as these were activities involving public trust, but that no such trust function arose in connection with the making of loans. He added that no bank could expect to operate satisfactorily and with reasonable success unless it was free to make general loans, and that such additional reservation was believed to be undesirable. After further discussions on this point, and at a subsequent meeting, Mr. Oda agreed to withdraw this suggestion.

Mr. Oda then stated that the Japanese representatives understood that the functions performed by the Bank of Japan and the Federal Reserve Bank are outside the scope of business activities as guaranteed in paragraph 1, Article VII, and therefore that the acquisition of shares of stock in such central banks may be restricted.

Dr. Waring replied that participation in the Federal Reserve system of the United States was reserved to member banks, and that no shares of stock in the Federal Reserve system were sold or held by individuals. If shares in the Bank of Japan were sold publicly in Japan, Dr. Waring added, it would be permissible for the Government of Japan

to

to establish restrictions which would prevent the purchase of such shares by aliens. He confirmed the understanding of the Japanese representatives that the acquisition of shares in central banks was not among the business or investment activities contemplated in paragraph 1, Article VII.

With reference to "(d) brokerage of commodities and securities", Dr. Waring stated that he could perceive no valid reason why an activity so wide in scope need be included among the reserved fields in paragraph 2, and that the United States representatives could not agree to its insertion. He added that the inclusion of "(e) emigration agents" was also undesirable because it would lead to serious misunderstanding unless a detailed explanation, which would have no place in the Treaty, were made regarding their functions and obligations as conceived by the Government of Japan. However, Dr. Waring observed, if such "emigration agents" were, as suggested by the Japanese representatives, to be regarded as quasi-governmental officials, he believed that the Government could without difficulty require that they be of Japanese nationality. He added that he did not believe that a national of the United States would attempt, even if he could qualify under Japanese law, to engage in the profession of "emigration agent". In connection with "(f) other activities which may be specified by mutual agreement", Dr. Waring stated that either Government could, if future circumstances so warranted, consult with the other regarding possible revisions or additions to the Protocol of the Treaty, and that the inclusion of a clause along the lines of (f) was therefore unnecessary and would moreover lead to doubts and confusion on the part of businessmen of either country.

With respect to points (a), (b), and (c), as proposed by Mr. Oda, Dr. Waring suggested that these could properly be included by amending the present wording of paragraph 2 ("establish, acquire interests in, or carry on enterprises engaged within its territories in communications, air and water transport, banking involving depository or fiduciary functions, or the exploitation of land or other natural resources") to read as follows:

> ". . . establish, acquire interests in, or carry on public utilities enterprises or enterprises engaged in shipbuilding, air or water transport, banking involving depository or fiduciary functions, or the exploitation of land or other natural resources."

In clarification of the term "public utility enterprises", Dr. Waring further proposed the addition in the Protocol of a new paragraph (designated paragraph 3 of the Protocol in the final text of the Treaty) which he believed would meet fully the Japanese position. The proposed paragraph 3 of the Protocol reads as follows:

> "The term 'public utility enterprises' as used in Article VII, paragraph 2, is deemed to include enterprises

engaged

engaged in furnishing communications services, water supplies, transportation by bus, truck or rail, or in manufacturing and distributing gas and electricity, to the general public."

Mr. Oda replied that these proposals were acceptable to the Government of Japan. Dr. Waring then suggested the addition to paragraph 3, Article VII, of the words "of the present Article" following the words "the provisions of paragraph 1", which, in his opinion, would serve to clarify this paragraph. Mr. Oda replied that this change was acceptable.

Mr. Oda then stated that, under the "Law Concerning Aliens Engaged in Insurance Enterprises", aliens are required to make a security deposit to engage in the insurance business in Japan, and that the amount of this deposit is larger than that required of Japanese nationals carrying on the same activity. Mr. Oda therefore requested confirmation of the statement previously made by the American representatives (Memorandum of Conversation, Fourth Informal Discussion, March 4, 1952) to the effect that: ". . . the provisions of Article VII, paragraph 3, permit either party to prescribe special formalities in connection with alien-controlled enterprises, and such formalities might conceivably include security deposits, provided they did not impair the substance of the rights set forth in Article VII, paragraph 1, of the standard draft."

Mr. Oda stated that, under the relevant Japanese law, insurance enterprises operated by aliens are obligated, in case an insurance contract is made in terms of Japanese currency, to hold a certain amount of revenue from premium paid under this contract as a designated asset in Japanese currency. He asked whether, in the opinion of the United States representatives, such a requirement would be regarded as falling under "special formalities" as provided in paragraph 3 of Article VII.

Dr. Waring replied that the United States representatives could not give any definite answer inasmuch as they did not have the knowledge of the details of pertinent Japanese law and asked for the necessary materials for consideration.

At a subsequent meeting and after consideration of the relevant provisions of the "Law for Foreign Insurers" and "Enforcement Regulations of the Law concerning Foreign Insurers" which had been submitted by the Japanese side, Dr. Waring replied that such a requirement as that imposed on foreign insurers in the said law could be considered as being included in "special formalities", provided it did not impair the substance of the rights set forth in Article VII, paragraph 1.

Dr. Waring observed that unless the difference in the amounts required as security from alien and domestic insurance firms was so

great

great as to be unduly discriminatory or tantamount to a prohibition of alien participation in this activity, he believed it was not unreasonable to require of alien insurance firms a somewhat higher security deposit than that required of domestic firms. Dr. Waring therefore stated that he could confirm the statement previously made by the American representatives.

Mr. Oda stated that, in connection with the phrase "in all that relates to the conduct of the activities thereof" contained in the final sentence of paragraph 1, it was the understanding of the Government of Japan that financing by Government-capitalized banks (e.g., the Japan Export-Import Bank) and Government subsidies for the protection of infant domestic industries need not be extended to aliens, thus constituting an exception to the concept of national treatment expressed in that paragraph.

Dr. Waring replied that any bank, including one controlled by the Government, could make whatever loans it chose, and that it was under no obligation to extend loans to any individual, either a national of the country or an alien. He added that citizens of the United States would not acquire a right under the Treaty to demand that the Japan Export-Import Bank extend loans simply because the bank chose to make such loans to Japanese nationals. However, Dr. Waring pointed out, he doubted the wisdom of any policy adopted by the Japan Export-Import Bank or any similar organization to limit loans to nationals since there might well arise individual cases involving aliens which would be profitable to both the bank and Japan itself. He further stated that the United States Export-Import Bank often makes loans to foreign nationals and Governments, including Japan, to promote the export trade of the United States, and that a similar practice might well be followed by the Japan Export-Import Bank.

With respect to subsidies, Dr. Waring invited attention to statements previously made by the American representatives that a subsidy was in the nature of a grant from a Government for a specific purpose and that it was normal for the Government making such a grant to limit the recipients to those who are citizens of the country. Thus, each party, Dr. Waring added, so long as it does not violate other provisions of the Treaty, retains full freedom to subsidize its own citizen-owned national shipping, without being obliged to extend such subsidies to shipping owned by aliens. However, he said, the Department of State has pointed out that, although it does not pretend to interpret United States laws, shipbuilding subsidies payable by the United States Government are not restricted by law to United States citizens.

It was then agreed that there was no need for further detailed discussions on Article VII, and that consideration of the broader policy questions involved would be deferred until subsequent meetings.

At a later meeting (please see section entitled "Final Discussions on Negotiating Points"), the Japanese representatives proposed that

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the second sentence of paragraph 2, Article VII, be revised to permit the retroactive application of new limitations, except with respect to banking activities, on a reciprocal basis. The United States representatives stated that provision for such retroactive action would appear to be unnecessary inasmuch as the Government of Japan had the right to determine the extent of alien participation in any one of the reserved fields at such time as the desired investment was screened. Moreover, they added, there would appear to be no interests owned by United States nationals, other than banking for which an exception was made in the Japanese proposal, presently existing in Japan to which such a provision would be applicable. The United States representatives added, however, that the concept of reciprocity suggested by the Japanese representatives was acceptable to the Department of State. Agreement was then reached on a reservation concerning the right of Japan to accord treatment to enterprises of nationals and companies of the United States no more favorable than that accorded to nationals and companies of Japan by the State or Territory in which such United States national is domiciled or such company is organized. It was further agreed that this reservation be inserted in the Protocol as the second sentence of paragraph 4.

The Japanese representatives also raised the question of the relationship between Article 12 of the Treaty of Peace with Japan and the Treaty under discussion, with particular reference to the reserved fields of activity mentioned in Article VII (please see section entitled "Final Discussions on Negotiating Points"). The United States representatives stated that the Department of State regarded the Treaty under discussion as replacing Article 12 of the Treaty of Peace, and suggested that no reservation along the lines proposed by the Japanese representatives was necessary. This clarification was satisfactory to the Japanese representatives who withdrew their proposal.

As a result of further discussions (please see "Final Discussions on Negotiating Points") concerning investment activities by aliens in Japan, agreement was reached concerning a reservation proposed by the Japanese representatives which would permit Japan to continue, for a period of three years from the coming into force of the Treaty under discussion, the application of existing restrictions (i.e., those contained in the Foreign Investment Law) on the purchase by aliens, with yen, of outstanding shares in Japanese enterprises. This reservation was accepted by both parties for inclusion in the Protocol as paragraph 15.

It was then agreed that, with the various revisions indicated above and with the inclusion in the Protocol of reservations mutually agreed upon, Article VII was acceptable to both the Japanese and United States representatives.

Article VIII

ARTICLE VIII

Mr. Oda proposed that the word "exclusively" be inserted in the second sentence of paragraph 1, thus revising the present phrase to read: "...for the particular purpose of making examinations, audits and technical investigation exclusively for, and rendering reports to..."

Dr. Waring replied that the insertion of the word "exclusively" in that clause of paragraph 1 was acceptable to the Department of State.

Mr. Oda then stated that he understood the American representatives had under consideration a Japanese proposal that pilots and notaries public should constitute professions to which the extension of national treatment was not to be applicable. He added that pilots and notaries public in Japan had quasi-official status and that it was required that they be of Japanese nationality.

Dr. Waring replied that it was acceptable that the provisions of paragraph 2 be withheld in connection with notaries public and pilots, who are called "port pilots" in English to avoid confusion with other types of pilots. Mr. Oda stated that the term "marine pilots" was probably more acceptable to the Japanese representatives, but added that the pilots in question were actually those who brought vessels into port and guided vessels out of ports and surrounding waters. Dr. Waring therefore proposed that the following paragraph be inserted in the Protocol, to be identified as paragraph 5 in the final text of the Protocol:

> "The provisions of Article VIII, paragraph 2, shall not extend to the professions of notary public and port pilot."

Mr. Oda stated at a subsequent meeting that the proposed paragraph was acceptable to the Japanese representatives.

Dr. Waring proposed that the word "residence" be inserted in paragraph 2, revising the present phrase to read: "with the requirements regarding qualifications, residence and competence that are applicable to nationals of such other Party". Mr. Oda replied that the insertion of the word "residence" was acceptable to the Japanese Government.

Mr. Oda then proposed that the last sentence of paragraph 3 ("Nothing in the present Treaty shall be deemed to grant or imply any right to engage in political activities") be placed elsewhere in the Treaty since, in his opinion, this subject was not properly a part of Article VIII. Mr. Oda suggested that the sentence might

appropriately

appropriately be inserted as a new paragraph in Article XXI.

Dr. Waring replied that it was acceptable to the American representatives that the sentence in question be included in Article XXI as paragraph 5.

It was then agreed that, with the revisions mentioned above, Article VIII was acceptable to both the Japanese and American representatives.

ARTICLE IX

Mr. Oda stated that he fully appreciated the need for the formula utilized in the draft of the Department of State in connection with Article IX which limits the extension of aliens of national treatment with respect to land ownership to that which is possible under the various state laws of the United States. He added that this phraseology however, implied a "negative reciprocity" and that the Government of Japan would prefer a more positive statement in connection with land ownership. Mr. Oda stated that he believed it unwise to treat the subject of land ownership in two separate paragraphs, one pertaining to treatment of Japanese nationals by the United States, and another to treatment of United States nationals by Japan. Pointing out that this matter was one of grave concern to his Government, Mr. Oda stated it was desired that this separate treatment be eliminated from the Treaty, and that the following paragraph be inserted in place of paragraphs 1 and 2:

> "1. Nationals and companies of either Party shall be accorded within the territories of the other Party: (a) national treatment with respect to leasing land, buildings, and other immovable property appropriate to the conduct of activities in which they are permitted to engage pursuant to Article VII and VIII and for residential purposes, and with respect to occupying and using such property; and (b) other rights in immovable property permitted by the applicable laws of the other Party."

Dr. Waring stated that this proposal had previously been transmitted to the Department of State for consideration, and he was pleased to inform Mr. Oda that the Department had accepted the insertion of this paragraph in place of the present paragraphs 1 and 2 of Article IX. Dr. Waring added he realized that this subject had been one of particular concern to the Government of Japan and that he believed this revision to be desirable in connection with the proposed Treaty.

Mr. Oda then proposed that paragraph 4 should be inserted immediately following the newly approved paragraph 1, and that the words, "personal property", be amended to read "movable property", to

conform

conform with the phraseology employed in the first paragraph (in which "real property", used in the original draft of the Department of State, had been revised to read "immovable property"). Mr. Oda stated that the use of the terms "movable" and "immovable" with reference to property was more easily understood in the light of Japanese laws, and that these words had already been employed by the United States in its treaties with Colombia, Israel, and Denmark.

Dr. Waring replied that the transposition of paragraph 4, to be numbered paragraph 2 in the final text of the Treaty, was acceptable, as was also the substitution of the words "movable property" for "personal property".

Mr. Oda further proposed that the phrase, "interests in enterprises carrying on particular types of activity", in the same paragraph, be amended to read "interests in enterprises as set forth in Article VII, paragraph 2". He stated that the revised clause would be clearer and would doubtlessly reflect the intent of the provision as originally drafted by the Department of State.

Dr. Waring replied that the revised wording proposed by the Japanese representatives was acceptable, but suggested that this phrase be amended to read: "interests in enterprises carrying on the activities listed in the first sentence of paragraph 2 of Article VII". It was agreed to revise paragraph 2 accordingly.

Mr. Oda inquired whether it was understood that a Japanese marine or shipping company, engaged in international operations, could establish branches in the United States, and whether such branches had the right to lease, occupy, and use wharves, warehouses, and similar installations pursuant to the provisions of Article VII.

Dr. Waring replied that the right to establish and maintain branches of the types mentioned by Mr. Oda was adequately covered in paragraph 2, Article VII, and that the acquisition and use of needed physical installations by such branches was governed by paragraph 1 (a), Article IX. If the Japanese representatives desired, Dr. Waring added, specific mention could be made of shipping or other transportation companies in paragraph 2, Article VII, the last sentence of which could be amended to read: "Moreover, neither Party shall deny to shipping or other transportation, communications and banking companies of the other Party the right to maintain branches and agencies to perform functions necessary for essentially international operations in which they are permitted to engage". Dr. Waring pointed out that these activities were included in those reserved under the first sentence of paragraph 2, Article VII, but that an exception was made in the third sentence, as mentioned above, for enterprises engaged in international operations. Such enterprises performing "functions necessary for essentially international operations" would therefore be granted

national

national treatment in the acquisition and use of immovable properties, in accordance with the terms of paragraph 1 (a), Article IX.

Mr. Oda stated that the language suggested by Dr. Waring was acceptable to the Japanese representatives. Mr. Oda observed that the additional phrase "shipping or other transportation" was, in this opinion, unnecessary since the explanation given by Dr. Waring concerning the provisions governing the acquisition and use of the immovable properties by branches had clarified the questions raised by the Japanese representatives.

With further reference to paragraph 2, Mr. Oda stated that the Japanese representatives had previously proposed that a reservation should be entered with respect to the extension of national and most-favored-nation treatment in connection with shipping matters. He added that the Marine Transportation Law requires all persons or organizations subject to Japanese law to obtain specific authority from the Ministry of Transportation prior to the acquisition or lease of any vessel from an alien, or to the sale or lease of a Japanese vessel to an alien. Mr. Oda stated that the United States representatives, in answer to a similar question previously raised by the Japanese group, had declared that "any regulations governing transfers of shipping ownership and/or registry are applied by a Government to its own nationals and not to the alien buyers or sellers...". Mr. Oda felt that further clarification on this point was necessary.

Dr. Waring replied that shipping was one of the reserved fields of activity listed in Article VII and that alien participation could therefore be restricted. Moreover, each Party was free to impose whatever limitations it felt were necessary on the activities of its own nationals in connection with the lease, purchase, or sale of vessels. If, for example, either government required that specific authority be granted prior to the sale to an alien of a vessel of national ownership and registry, an alien would acquire no right under a Treaty of the type under discussion to demand that a transaction involving a ship in which he was interested be permitted without compliance with the regulations governing lease, purchase, or sale imposed by the Government on its own nationals.

Mr. Oda then suggested that paragraph 3 be revised to replace the present phraseology ("shall be permitted a term of at least five years in which to effect such disposition") with one which would establish a "reasonable period" during which aliens could dispose of inherited property rights in fields in which national treatment was not to be extended. Mr. Bassin replied it was undesirable that a precise period of time, as presently provided in the Treaty, be replaced by so vague a concept as a "reasonable time"; he added that, although a five-year period might first appear to be unduly long, complicated inheritance cases involving court decisions and the subsequent sale of the properties in question might well require as long as five years.

Mr. Oda

Mr. Oda replied that he agreed with Mr. Bassin in this connection and, after further consideration, the Japanese representatives withdrew their proposed revision of this phrase. It was agreed that paragraph 5 of the original draft of Article IX would become paragraph 4 of the final text.

It was then mutually agreed that, with the various revision described above, Article IX was acceptable to both the Japanese and United States representatives.

ARTICLE X

Mr. Oda suggested the deletion of the numerical designation of the sole paragraph under this Article inasmuch as paragraph 2 of the original draft had already been inserted as paragraph 2 of Article V. Dr. Waring concurred.

Mr. Oda then stated that the Japanese representatives had previously proposed that the phrase, "upon compliance with the laws and regulations with respect to registration and other formalities", be inserted in Article X for the sake of clarity. He added that the United States representatives had previously indicated that it was understood this paragraph of Article X meant the obtaining and maintenance of patents and inventions in accordance with the appropriate laws and regulations of either country, and that the additional phrase was therefore unnecessary. Mr. Oda stated that the Japanese representatives still believed the proposed addition was desirable.

Dr. Waring replied that the proposal of the Japanese representatives had already been transmitted to the Department of State for consideration, and that the latter concurred in the view of the United States representatives that this additional phrase was both unnecessary and undesirable. The Department had indicated that compliance with applicable laws and regulations equally by nationals of the country and aliens in similar circumstances was implied in every reference in the Treaty to national and most-favored-nation treatment, and that there was no more reason for elaborating on this point in connection with Article X than there was in connection with any other provision of the Treaty which makes reference to these standards of treatment. Dr. Waring added that insertion of the clause proposed by the Japanese representatives in Article X, although it might possibly clarify this Article for some readers, would tend to confuse others because of its very omission from other Articles.

Mr. Oda stated that this explanation was acceptable to the Japanese representatives. It was then agreed that Article X was mutually acceptable to both the Japanese and United States representatives.

ARTICLE XI

ARTICLE XI

Mr. Oda stated that the Government of Japan had previously proposed a revision of paragraph 5 (c) and that the United States representatives had indicated they would refer this proposal to the Department of State for its consideration. Mr. Oda inquired therefore whether the United States representatives were ready to discuss the Japanese proposal which would replace the present text of paragraph 5 (c) with the following:

> "...accord to its own nationals and to residents of contiguous countries more favorable exemptions of a personal nature with respect to income taxes and inheritance taxes than are accorded to other non-resident persons".

Dr. Waring replied that the proposed revision was acceptable to the United States representatives.

Mr. Otabe then pointed out that, under Japanese law, residents are subject to progressive tax rates on total income regardless of nationality, whereas nonresidents are generally subject to a certain fixed tax rate on individual income as stipulated in pertinent Japanese laws and regulations. Mr. Otabe inquired whether it was understood that such a difference in the treatment extended to residents and nonresidents on tax matters was not in conflict with the national treatment provisions of this Article. He added that no discrimination was made on the basis of alienage, but solely on that of the residence status of the individual concerned.

Dr. Waring stated that differences in the treatment of residents and nonresidents in tax matters, provided no discrimination of aliens was involved, was permissible under the terms of Article XI. It was then agreed that this Article was mutually acceptable to the Japanese and United States representatives.

ARTICLE XII

Mr. Oda made reference to previous discussions on this Article, and proposed that paragraph 1 be deleted and the following substituted therefor:

> "Nationals and companies of either Party shall be accorded by the other Party national treatment and most-favored-nation treatment with respect to the application of exchange restrictions on current transactions, and shall be accorded most-favored-nation treatment with respect to the application of exchange restrictions on capital transactions."

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In reply to a question from the United States representatives as to the reason Japan desired to distinguish between current and capital transactions under the Treaty, Mr. Oda stated that the Foreign Investment Law imposes restrictions on the acquisition by aliens of outstanding shares of Japanese enterprises. He added that the continuation of such limitations was deemed essential by Japanese officials and businessmen to protect Japanese industries from being controlled by alien interests. Mr. Oda stated that outstanding shares in Japanese enterprises were currently undervalued, principally because their equity capital represented only a small percentage of their total assets, arising in part from bank loans and other credit, and that a foreign investor might, with a relatively modest investment, acquire controlling interest in leading Japanese enterprises.

Dr. Waring replied that, although further study would be given the point raised by Mr. Oda in connection with current restrictions under the Foreign Investment Law, the proposed paragraph establishing a distinction between the application of exchange controls to capital and current transactions was unacceptable to the United States representatives. Dr. Waring stressed that such a proposal would appear to undermine the basic principles which the Treaty hoped to establish, and would serve seriously to deter the inflow of capital which the Government of Japan had indicated it desired and wished to encourage.

Mr. Otabe observed that Japan wished to limit its extension of national treatment to current transactions involved in certain business activities, and he pointed to the fact that the International Monetary Fund allows its members to impose necessary controls on capital movements. Mr. Otabe added that the Japanese representatives believed the Treaty under discussion should not limit Japan's freedom of action in this field to a greater extent than is required under the International Monetary Fund Agreement.

Dr. Waring replied that the United States representatives had erroneously indicated during previous discussions that the provisions of Article XII did not go beyond the discretionary rights a Party may have under the Articles of Agreement of the International Monetary Fund. He added that the position of the Department of State was that the Parties to the Treaty would not retain the complete freedom of action over capital movements provided in Section 3, Article VI of the International Monetary Fund Agreement. So far as their bilateral relations were concerned, Japan and the United States would agree in the Treaty under discussion to treat capital movements as set forth in Article XII, paragraph 3, with such qualifications, of course, as are otherwise set forth in the Treaty. Dr. Waring stressed the fact that Article XII established the principle of nondiscriminatory

treatment

treatment, and stated that this was an important feature of the Article which should not be overlooked. He added that this paragraph also calls for something more than nondiscriminatory treatment since it provides for "reasonable" remittances for all, and that merely observing nondiscrimination would not necessarily exhaust the requirement of reasonableness. Article XII, Dr. Waring remarked, not only seeks to regulate the process of tightened restrictions should these become necessary, but visualizes also the relaxation of existing restrictions as rapidly as circumstances warrant. He stated that the subject of investment was properly covered in Article VII, concerning which the United States representatives had already made concessions to accommodate the Japanese representatives. Article XII covered the flow of funds between the two countries, Dr. Waring added, and it would seem inappropriate here to incorporate further restrictions on foreign investment to supplement those already established under Article VII.

Mr. Oda made reference to previous discussions concerning Article VII as it relates to the introduction of capital, and Article XII in connection with rights of remittance of profits arising from investment in Japan. He added that Japan's right to "screen" investment under the provisions of the Foreign Investment Law should be clearly recognized, inasmuch as Japan was obliged to take measures to safeguard its monetary reserves and was not in a position to make available foreign exchange in unlimited amounts for remittance of profits. Mr. Oda therefore proposed that a reservation be inserted in the Protocol which would permit Japan to exercise control over foreign investment activity to protect the country's monetary reserves.

Dr. Waring replied that the Department of State appreciated the problem raised by the Japanese representatives and would be willing to insert a paragraph in the Protocol to accommodate them in this connection. Dr. Waring stated that the following provision would be acceptable to the Department of State:

> "Either Party may impose restrictions on the introduction of foreign capital as may be necessary to protect its monetary reserves as provided in Article XII, paragraph 2."

In reply to a question raised by the Japanese representatives, Dr. Waring explained that the Department of State proposed the above-quoted provision solely in response to the request of the Japanese representatives that the Treaty recognize Japan's right to apply restrictions designed to safeguard its monetary reserves.

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Therefore, he added, such restrictions could be applied in cases where the foreign investor desired the right to remit, in foreign exchange, profits arising from his investment, and to withdraw his capital. These restrictions were not applicable, however, in cases where the investor waived his right of remittance in foreign currency, inasmuch as such investment would not affect Japan's monetary reserves.

At a subsequent meeting, and with the reservation that the subject of purchases by foreigners of outstanding shares in Japanese enterprises would be discussed at a later date, Mr. Oda indicated that the provision proposed by the Department of State was acceptable to the Japanese representatives, and it was agreed that it would be inserted in the Protocol as paragraph 6.

Mr. Oda then made reference to previous discussion concerning the remittance by United States nationals of profits arising from nondollar investment in Japan, and stated that the Japanese representatives desired some revision or clarification of the phrase in Article XII, paragraph 3, reading "it shall...make reasonable provision for the withdrawal, in foreign exchange in the currency of the other Party. . ."

Dr. Waring replied that this clause in paragraph 3 was essential to the Treaty and that its deletion or modification would materially alter the substance of the rights established under the Treaty. He added that the Department of State was of the view that Article XII would not preclude the application of reasonable exchange restrictions which would specify the currencies in which United States investors might make investments and establish the conditions for the withdrawal of capital and earnings with respect to investment made in currencies than other dollars. Under these circumstances, Dr. Waring said, there would probably be an understanding between the Government of Japan and the individual investor or there might be general, published rules as to the conversion into dollars of earnings and dividends derived from nondollar investment.

Mr. Oda then asked for further clarification of previous discussions concerning the phrase, "giving special consideration to special needs for other transaction", in paragraph 3, and its relation to the preceding clauses (a), (b), and (c). He stated that the United States representatives had earlier indicated that the phrase in question appeared to refer only to clause (c).

Mr. Adams replied that the previous statement of the United States representatives was in error and that the phrase under

discussion

discussion applied to all three clauses. Dr. Waring added that the concluding phrase, "giving consideration to special needs for other transactions", in paragraph 3 is a qualification which is not limited to clause (c). He pointed out that this paragraph reflects an attempt by the Department of State to strike a fair balance between and among all the equities at stake; the Department wished to emphasize the principle of assuring maximum feasible privileges to investor interests, after allowance for the monetary reserve considerations of paragraph 2 and the need for financing essential imports and services. This allowance having been made, Dr. Waring added, it was still unfeasible to give investor claims an absolute priority over all others, and some flexibility was therefore retained to meet other proper and legitimate claims for a fair share of the limited exchange available during a period of stringency. The paragraph in question, he said, introduces the recital of investor claims with the phrase "reasonable provision", and concludes with the reference to the proposition that such investor claims, although entitled to particular consideration, are not to the exclusion of all other legitimate claims upon available exchange.

Mr. Oda proposed that paragraph 6 of this Article be deleted, inasmuch as adequate provision for consultation between the Parties was made in Article XXIV, and its reiteration in Article XII placed undue emphasis on consultation concerning financial matters.

Dr. Waring replied that the Department of State wished to accommodate the Japanese representatives in this connection and agreed to delete paragraph 6. It was then agreed that Article XII was mutually acceptable.

ARTICLE XIII

Mr. Oda stated that the Japanese representatives had no questions concerning Article XIII, and it was agreed that this Article as originally drafted was acceptable to both the Japanese and United States representatives.

ARTICLE XIV

Mr. Oda invited attention to the fact that paragraph 1 of this Article employes the word "products" in connection with both imports and exports, whereas the FCN Treaties concluded by the United States with Uruguay, Ireland, Colombia, Greece, and other use the word "products" only for imports and the word "articles" for exports. Mr. Otabe inquired whether it was understood that the word "articles" included the products of third countries reexported by one of the contracting Parties

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to the other, or whether such reexport trade was excluded under both the term "articles" and the word "products".

Dr. Waring replied that these words were synonymous and that he believed the use of "products" for both imports and exports was preferable. He added that neither of the two words envisaged the reexportation of products of a third country to the territories of either of the contracting Parties, since it is clear that the most-favored-nation treatment granted by one party to the other need not be extended to a third country or its products. In compliance with Mr. Oda's request, Dr. Waring stated that the memorandum of conversation would record the fact that the United States representatives regarded the word "products", as used in the Treaty under discussion, as identical with the term "articles the growth, produce, or manufacture of" employed in paragraph 4, Article XIV, of the FCN Treaty between the United States and Colombia.

Mr. Oda then stated that the last sentence of paragraph 1 (i.e., "A like rule shall apply with respect to requirements, formalities and charges in connection with the international transfer of payments for imports and exports") was not entirely clear to the Japanese representatives, and he invited Dr. Waring's attention to comments previously made by the Japanese representatives with respect to the relation of this sentence to the foreign exchange controls and other subjects covered by Article XII and other Articles of the Treaty.

Dr. Waring replied that the Department of State was prepared to accommodate the Government of Japan in this matter, and it therefore proposed the following clause, based on Article I of the General Agreement on Tariffs and Trade, in substitution of all that portion of paragraph 1 following the words "by whatever type of carrier":

> "with respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation".

Mr. Oda indicated that this clause appeared to be satisfactory; at a subsequent meeting, he confirmed the fact that the proposed substitution was acceptable to the Government of Japan.

Mr. Oda

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Mr. Oda then referred to paragraph 3 (a) and stated that the Japanese representatives had previously proposed that a reservation be inserted in the Protocol to the effect that it was understood that the provisions of this subparagraph would not obligate either Party to give prior public notice when such notice was likely to affect adversly the market conditions of specific commodities to be imported.

Dr. Waring replied that the draft Treaty employs the term, "as a general rule", with reference to the issuance of prior public notice, and that it was believed this term gave either Government the desired latitude to withhold such prior public notices if circumstances so warranted. He added that the reservation suggested by the Japanese representatives was unnecessary inasmuch as the present phraseology of paragraph 3 (a) permits the discretion desired by the Japanese representatives. Mr. Oda then stated that this point of view was shared by the Government of Japan and that the Japanese representatives would withdraw their proposal for such a reservation in the Protocol.

Mr. Otabe inquired whether it was understood that the term, "special factors", employed in paragraph 3 (b), included international commitments under trade agreements which either Party has concluded or may conclude with third countries. Dr. Waring replied that such trade agreement commitments were regarded as among the "special factors", but that it should also be understood in this connection that such international commitments should not affect adversly the extension of fair and reasonable treatment based in past experience (for example, with reference to import quotas).

Mr. Otabe then stated that it was the understanding of the Japanese representatives that, in connection with the phrase "with respect to all matters relating to importation and exportation" in paragraph 5, an exception to the granting of national treatment could be made with reference to financing by Government-capitalized banks, such as the Export-Import Bank of Japan. Dr. Waring indicated that this point had already been discussed in connection with Article VII. He again pointed to the fact that the Export-Import Bank of the United States does not limit its loans to nationals of the United States, and he added that it might be advantageous to Japan should its Government-financed banks make loans to aliens from time to time. However, Dr. Waring said, banks are free to extend whatever loans they may deem appropriate, and they would not be obligated under this Treaty to make such loans to aliens.

Mr. Oda

Mr. Oda then referred to a proposal made by the Japanese representatives during the previous round of discussions concerning a reservation to Articles XII and XIV with reference to import and export controls necessary to supplement exchange restrictions. Mr. Oda stated that the Japanese representatives now wished to amend their previous proposal and suggested that the following paragraph be inserted in the Protocol:

> "It is understood that a Party may, notwithstanding Article XIV, second sentence of paragraph 1, paragraphs 2 and 3 (b) and Article XVII, paragraph 1, apply restrictions or controls on importation and exportation of goods that have effect equivalent to, or which are necessary to make effective, exchange restrictions."

Dr. Waring replied that the Department of State had previously indicated its belief that any such reservation should be applicable only to Article XIV and its relation to Article XII, and that it was prepared to meet the problem raised by the Japanese representatives by offering the following paragraph, which it was proposed should be inserted as paragraph 7 or Article XIV:

> "Notwithstanding the provisions of paragraphs 2 and 3 (b) of the present Article, a Party may impose quantitative restrictions on importation and exportation of goods that have effect equivalent to, or which are necessary to make effective, exchange restrictions applied pursuant to Article XII. However, such restrictions shall depart no more than necessary from the aforesaid paragraphs and shall be conformable with a policy designed to promote the maximum development of nondiscriminatory foreign trade and to expedite the attainment both of a balance-of-payments position and of monetary reserves which will obviate the necessity of such restrictions."

Mr. Oda replied that the proposed paragraph appeared to be acceptable, but that further study would be given this matter by the Japanese representatives. At a subsequent meeting Mr. Oda stated that the Government of Japan wished to reserve the right to impose restrictions and controls on imports and exports other than quantitative restrictions, and he proposed that the phrase in the first sentence, "a Party may impose quantitative restrictions", be amended to read "a Party may apply restrictions or controls". He also proposed that the opening clause of the second sentence, "such restrictions", be revised to read "such restrictions or controls".

Dr. Waring

Dr. Waring stated that the changes proposed by Mr. Oda were acceptable to the United States representatives, and agreed that the paragraph quoted above, revised as indicated, be included as paragraph 7 of Article XIV.

It was then agreed that, with the various revisions described above, Article XIV was acceptable to both the Japanese and United States representatives.

ARTICLE XV

Mr. Oda stated that the word "nominal", as used in the second sentence of paragraph 2, Article XV, would tend to give rise to doubtful interpretations with respect to the application of pertinent Japanese laws and ordinances. He added that this sentence would be clearer to the Japanese representatives if it were revised to include the phraseology employed in paragraph 3, Article VIII of the General Agreement on Tariffs and Trade. Mr. Oda stated that the GATT provision in question was as follows:

> "No Contracting Party shall impose substantial penalties for minor breaches of customs regulations or procedural requirements. In particular, no penalty in respect of any omission or mistake in customs documentation which is easily rectifiable and obviously made without fraudulent intent or gross negligence shall be greater than necessary to serve merely as a warning."

Dr. Waring stated at a subsequent meeting that the Department of State accepted the suggestion of the Japanese representatives and proposed that the second sentence of paragraph 2 be revised to read as follows:

> "Penalties imposed for infractions of the customs and shipping laws and regulations concerning documentation shall, in cases resulting from clerical errors or when good faith can be demonstrated, be no greater than necessary to serve merely as a warning."

Mr. Oda replied that this revised sentence was acceptable to the Japanese representatives.

Dr. Waring then made reference to previous discussions concerning the proposal of the Department of State that an additional paragraph, to be designated as paragraph 3, be included in Article XV. The provision proposed by the Department of State is as follows:

"Neither

"Neither Party shall impose any measure of a discriminatory nature that hinders or prevents the importer or exporter of products of either country from obtaining marine insurance on such products in companies of either Party."

Mr. Oda replied that this additional paragraph was generally acceptable to the Japanese representatives, but that it should be understood that this clause was subject to the provisions of Article XII. He proposed an additional clause which would clearly establish the fact that this provision would not preclude the application of foreign-exchange controls by the Government of Japan in connection with its monetary reserves.

Dr. Waring replied that it was recognized that regulations applied for the purpose of conserving foreign currencies in situations of stringency were allowable, it being understood, of course, that there would be a reasonable relationship between the stringency and such regulations. He added that the purpose of the provision proposed by the United States representatives was simply to prevent discrimination against foreign insurance companies, and proposed the following additional sentence for insertion in this paragraph: "The present paragraph is subject to the provisions of Article XII".

Mr. Oda replied that, as revised by the additional clause, the new provision, to be designated as paragraph 3 in the final text of the Treaty, was accepted by the Government of Japan.

It was then agreed that, with the revisions mentioned above, Article XV was acceptable to both the Japanese and United States representatives.

ARTICLE XVI

Mr. Oda referred to previous discussions during which the United States representatives stated that the provisions of Article XVI would not prevent the sale and distribution of Government-owned stocks of imported staple foods to stabilize prices or maintain an adequate flow of foodstuffs for public consumption. However, Mr. Oda stated, it might become necessary to impose controls over the sale, distribution, or use of certain essential imported articles which are different from those controls applicable to similar goods of domestic origin. He therefore proposed that a reservation be entered in the Protocol along the lines of paragraph 3 of the Additional Protocol to the FCN Treaty between the United States and Italy.

Dr. Waring

Dr. Waring replied that the Department of State had considered the questions raised by the Japanese representatives and offered the following proposal in the hope of resolving this problem:

> "During periods of emergency resulting in reduced availabilities of industrial raw materials and basic foodstuffs, the provisions of Article XVI, paragraph 1, of the present Treaty shall not prevent the application by either Party of needed controls over the internal sale, distribution or use of imported articles of categories which may be in short supply, other than or different from controls applied with respect to like articles of national origin. If imposed, such controls shall be applied by either Party in such a manner as to minimize injury to the competitive position within its territories of the commerce of the other Party, and shall be continued no longer than required by the supply situation."

Mr. Oda replied that the proposed paragraph was acceptable to the Japanese representatives, and it was agreed that it be inserted in the Protocol as paragraph 8.

Mr. Oda then referred to a previous proposal made by the Japanese representatives in connection with "screen quotas" (i.e., the right to apply the formula adopted under the General Agreement on Tariffs and Trade which permits a country to require that a certain percentage of "screen time" be reserved for domestic motion picture). Mr. Oda stated that the Japanese representatives desired a reservation which would permit the application of such a "screen quota" procedure.

Dr. Waring replied that the Department of State was willing to accommodate the Japanese representatives in this matter and had proposed that the following be inserted as paragraph 9 of the Protocol:

> "Notwithstanding the national treatment provisions of Article XVI, paragraph 1, a Party may maintain screen quota regulations that require the exhibition of cinematograph films of national origin during a specified minimum portion of the screen time actually utilized by exhibitors for the commercial exhibition of all films. Screen quotas shall be computed on the basis of screen time per theatre per year or the equivalent thereof, and shall be subject to consultation."

Mr. Oda

Mr. Oda stated that, in connection with the consultation concerning screen quotas mentioned in the above provision, it was the understanding of the Japanese representatives that this clause did not specifically mean prior consultation.

Dr. Waring replied that the phrase "subject to consultation" did not specify consultation prior to the establishment of the screen quota involved. It was the opinion of the United States representatives, however, that such consultation prior to the determination of the quota in question would be helpful and appropriate, and was to be preferred over consultation subsequent to such determination.

Mr. Oda stated that the proposed paragraph 9 of the Protocol appeared to be acceptable; at a subsequent meeting and after further consideration of this matter, Mr. Oda confirmed that this paragraph was acceptable to the Government of Japan.

It was then agreed that, subject to the two reservations in the Protocol discussed above, Article XVI was acceptable to both the Japanese and United States representatives.

ARTICLE XVII

Mr. Oda referred to previous comments made by the Japanese representatives in connection with the portion of paragraph 1 which provides that state trading enterprises or Government monopolies "shall make their purchases and sales.....solely in accordance with commercial considerations....", and to the desire of the Japanese representatives to ensure that the application of exchange restrictions or the utilization by the Government of accumulated inconvertible currencies would not be precluded by the terms of the clause in question. Mr. Oda proposed that a reservation be made in the Protocol along the lines of paragraph 10 of the Protocol to the FCN Treaty between the United States and Uruguay.

Dr. Waring replied that the insertion of such a reservation was acceptable to the Department of State and proposed that the following be entered in the Protocol as paragraph 10:

> "It is understood that for the purpose of Article XVII, paragraph 1, availability of means of payment is considered to be a commercial consideration."

Mr. Oda stated that the insertion of this provision was accepted by the Government of Japan, and it was then agreed that, with this reservation, Article XVII was acceptable to both the Japanese and United States representatives.

ARTICLE XVIII

ARTICLE XVIII

Mr. Oda made reference to the opening clause of paragraph 1 (i.e., "The two Parties agree that business practices which restrain competition, limit access to markets or foster monopolistic control..."), and stated it would appear that both domestic and international competition was envisaged. He added that the Japanese representatives believed a strict interpretation of this clause might lead to the conclusion that even Japan's state monopolies would be harmful to trade. Inasmuch as the Japanese representatives felt that domestic competition was not involved, Mr. Oda suggested that the words "in world trade" be inserted after the phrase "restrain competition", and again following the phrase "foster monopolistic control".

Dr. Waring replied that this provision of Article XVIII was not in conflict with Article XVII which recognizes the existence of state monopolies. He pointed out that the first paragraph of Article XVIII set forth a general principle and provided for consultation between the Parties with respect to such trading practices as might have a harmful effect on the commerce between them. In view of the general application of this clause, Dr. Waring added, the United States representatives believed the additional words, "in world trade", were unnecessary. At a subsequent meeting Mr. Oda withdrew the proposal made by the Japanese representatives.

Mr. Oda then stated that it was the opinion of the Japanese representatives that paragraph 2 would extend to aliens special advantages in the nature of subsidies, tax exemptions, and other concessions which were normally reserved to Government-operated enterprises and which would not be extended to Japanese nationals. In view of the fact that this paragraph would obligate Japan to grant treatment to foreigners more favorable than that accorded its own nationals, the Government of Japan desired the deletion of this paragraph.

Dr. Waring pointed out that this paragraph sought to prevent a situation whereby a Government-owned trading or manufacturing enterprise could, by virtue of tax exemptions and other special concessions from the Government, undersell privately owned enterprises to such an extent that the latter would suffer heavy losses or even be forced out of business. He added that he realized this provision might be interpreted as requiring for United States nationals treatment more favorable than the Government of Japan might presently contemplate for its own nationals, but it would appear reasonable that Japanese nationals should be afforded the same protection. Mr. Oda stated that further consideration would be given this matter by the Japanese representatives, and discussions on this point could be resumed later.

At a subsequent meeting (please see section entitled "Final Discussions on Ncogitating Points") Mr. Oda stated that, after further consideration of this matter, the Japanese representatives were still

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of the opinion that paragraph 2 was unacceptable to the Government of Japan. Mr. Oda added that it could be mutually understood that neither of the two Governments would, under normal circumstances, permit its publicly owned or controlled trading or manufacturing enterprises to operate in competition, within its territories, with privately owned and controlled enterprises of nationals and companies of the other Party in a manner detrimental to the interests of the latter, and that either Party would, upon the request of the other, enter into consultation with a view to a satisfactory adjustment of the possible relief of the party or parties affected.

Dr. Waring replied that this statement was acceptable to the United States representatives, although it was regretted that the Government of Japan had found that it could not fully subscribe to the inclusion in the Treaty of the paragraph in question. It was then agreed that paragraph 2 be deleted and that paragraph 3 of this Article be renumbered as paragraph 2. With this revision, Article XVIII was acceptable to both parties.

ARTICLE XIX

Mr. Oda referred to the proposal previously made by the Japanese representatives to delete the concluding clause of paragraph 3 (i.e., the phrase following the words "places and waters of such other Party") and to insert as a separate paragraph in this Article a similar provision to the effect that exceptional treatment might be accorded on the basis of reciprocity.

Dr. Waring replied that the Department of State had accepted the Japanese proposal and offered the following provision for insertion as paragraph 6, the provision presently bearing that number to be identified as paragraph 7 in the final text of the Treaty:

> "Notwithstanding any other provision of the present Treaty, each Party may reserve exclusive rights and privileges to its own vessels with respect to the coasting trade, national fisheries, and inland navigation, or may admit foreign vessels thereto only on a reciprocity basis."

Mr. Oda replied that this paragraph was generally acceptable, but he suggested the deletion of the words "national fisheries", pointing to the fact that national fisheries would appear to be adequately covered in other provisions of the Treaty.

Dr. Waring stated that the Department of State was unable to agree to the deletion of the words "national fisheries" because this would make the Treaty with Japan appear to exhibit a conspicuous diminution of the reservations relating to fishery matters that have

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been standard in the treaties signed with other countries in the past few years. Legally, Dr. Waring added, it might be said that the reservations on national fisheries are already carried in Article VII, paragraph 2, and Article XIV, paragraph 6 (a) and further clarified by the definitions in Article XIX, paragraph 7. The legal aspects of the problem, however, would be open to question, for example, in connection with the United States law requiring the domestic construction of United States fishing vessels, as well as with respect to the catch of a United States fishing vessel brought into port by another ship which was not a fishing vessel. A careful legal study would be required to determine whether the words "national fisheries" in paragraph 6 are indispensable from the purely technical viewpoint. However, Dr. Waring observed, the Department of State did not feel that a decision to include or exclude the reservation should be based on a judgment as to its legal necessity, but rather from the public relations stand-point to ensure that the Treaty would not give rise to questions as to whether the United States had yielded an abnormal concession in a field in which there is great public interest. He added that the inclusion of this phrase did not diminish or increase the rights of a Party outside its own territorial jurisdiction, but that it had reference only to the policies a Party may follow as to vessels and products coming under its territorial jurisdiction.

Mr. Oda stated at a subsequent meeting that the Japanese representatives were satisfied with Dr. Waring's explanation, and that the proposed paragraph 6 was acceptable to the Government of Japan.

Mr. Oda then asked whether the United States representatives had given further consideration to the previous proposal of the Japanese group to revise paragraph 5.

Dr. Waring replied that the Department of State suggested the following substitute for the present paragraph 5 to meet the questions raised by the Japanese representatives:

> "Vessels of either Party, in case of shipwreck, stranding, or of being forced to put into the ports, places, and waters of the other Party, whether or not open to foreign commerce and navigation, shall enjoy the same assistance and protection as are in like cases enjoyed by vessels of such other Party or of any third country, and shall not be subject to any duties or charges other than those which would be payable in like circumstances by vessels of such other Party or of any third country. The cargoes of such vessels of either Party and all articles salvaged from them shall be exempt for customs duties unless entered for consumption within the territories of the other Party; but articles not entered for consumption may be subject to measures for the protection of the revenue pending their exit from the country."

Mr. Oda informed the United States representatives at a later meeting that the proposed paragraph in substitution of the original paragraph 5 of the draft Treaty was acceptable to the Government of Japan.

Mr. Oda then stated that the Japanese representatives understood that the provisions of paragraph 4 of this Article would not preclude arrangements in connection with bilateral trade agreements with other countries under which the carriage of goods between the two countries would be reserved to their own merchant fleets. Mr. Oda added that this would appear to be similar to the requirement imposed by the United States with respect to the carriage by United States vessels of 50 percent of the cotton purchased by Japan under loans extended by the Export-Import Bank of the United States.

Dr. Waring replied that the two situations were not similar, since in the latter instance the Export-Import Bank was a creditor, and it was appropriate and reasonable for a creditor to establish whatever conditions were deemed appropriate in connection with a loan. He added that a Japanese credit institution would have the same right to impose certain conditions on loans it might extend. On the other hand, a bilateral arrangement to exclude foreign vessels other than those of the two countries concerned from the carriage of goods between these countries would, in the opinion of the United States representatives, be in conflict with the provisions of the Treaty under discussion.

Mr. Oda stated that some countries, among them Taiwan, demand that 50 percent of their trade with Japan be handled by their own Government-owned merchant fleets. Mr. Oda added that foreign trade is undertaken by the Government of Taiwan itself, there being no private enterprise involved in that country's export trade, and that Taiwan authorities therefore insisted that their Government, as owner and shipper, was entitled to reserve to its own vessels 50 percent of the marine carriage involved in trade with Japan.

Dr. Waring replied that it would appear that the Government of Taiwan might be entitled to impose such a condition, not on the basis of a bilateral agreement but rather in its capacity as owner and exporter of Taiwan goods. Although additional light might be shed on this problem as specific instances arose in the future, it would appear that such a situation would not necessarily be in conflict with the provisions of the Article under discussion.

Mr. Oda then stated "It is the understanding of the Government of Japan that those vessels which have been delivered to the Government of Japan by the Government of the United States of America in accordance with the provisions of the Charter Party Agreement between Japan and the United States of America signed at Tokyo on November 12, 1952, shall be deemed to be vessels of Japan during such times as they are under the flag of Japan.

Dr. Waring

Dr. Waring replied that, although he was not familiar with all the provisions and legal implications of the Charter Party Agreement, it could be understood that with reference to Article XIX of the Treaty under discussion, and without prejudice to the terms and provisions of the Charter Party Agreement, such vessels were to be regarded as vessels of Japan for the duration of the charter.

It was then agreed that, with the revisions discussed above, Article XIX was acceptable to both the Japanese and United States representatives.

ARTICLE XX

Mr. Oda referred to previous discussions on this Article, and stated that the Japanese representatives had inquired whether the word "transit", as used in this Article, had the same meaning as the definition contained in paragraph 1, Article V of the General Agreement on Tariffs and Trade. Although the United States representatives had already replied in the affirmative, Mr. Oda added, confirmation of this statement was desired.

Dr. Waring stated that the definition of transit as contained in the General Agreement on Tariffs and Trade was acceptable for the Treaty under discussion. However, he added, the word "transit", as used in the Treaty, deals with both goods and persons, whereas the General Agreement on Tariffs and Trade is concerned only with goods. Moreover, Dr. Waring observed, the Treaty does not deal with air transport as such, which is properly a matter for a special agreement of the type recently negotiated by the Governments of Japan and the United States. There were two ways, he added, in which Article XX had a bearing on aircraft: (a) goods and persons having transit privileges as specified in this Article would be entitled to utilize the services of licensed air carriers; and (b) an airplane, if crated, would be a "product" of a class with other merchandise for purposes of being carried in transit (subject to the provisions of Article XXI, paragraph 1 c).

It was then agreed that Article XX was mutually acceptable to the Japanese and United States representatives.

ARTICLE XXI

Mr. Oda stated that the Japanese representatives proposed the addition of the phrase, "of justice and to administrative tribunals and agencies", following the words "access to courts" in paragraph 1 (e) of this Article. He observed that this addition was desirable in order that this paragraph conform with paragraph 1, Article IV, in which the identical phrase was employed.

Dr. Waring replied that the proposal of the Japanese representatives was accepted.

Mr. Oda

Mr. Oda then referred to previous conversations concerning the status of Japan's application for accession to the General Agreement on Tariffs and Trade and its relation to the last sentence of paragraph 3. He proposed that this sentence be revised along the lines previously suggested by the Japanese representatives.

Dr. Waring stated that the United States representatives acknowledged the merit of the suggestion made by the Government of Japan, and that the Department of State offered the following substitute sentence to accommodate the Japanese representatives in this connection:

> "Moreover, either Party may withhold advantages negotiated under the aforesaid Agreement from those countries which by their own choice are not contracting parties thereto."

Mr. Oda informed the United States representatives at a subsequent meeting that the revised sentence was acceptable to the Government of Japan, and it was agreed that it would be substituted for the second sentence of paragraph 3.

It was also confirmed that the second sentence of paragraph 3, Article VIII, be deleted from that Article, as previously discussed, and inserted in Article XXI as paragraph 5.

It was then agreed that, with the revisions discussed above, Article XXI was acceptable to both the Japanese and United States representatives.

ARTICLE XXII

Mr. Oda stated that there were no further questions with reference to Article XXII, and it was agreed that this Article was acceptable to both the Japanese and United States representatives.

ARTICLE XXIII

Mr. Oda indicated that the Japanese representatives had previously proposed a reservation in the Protocol with reference to the special status of Nansei Shoto and other areas south of 29 degrees north latitude over which Japan retains residual sovereignty under the terms of the Treaty of Peace. Mr. Oda proposed, therefore, that the following provision be inserted in the Protocol:

> "With reference to Article XXIII, the present Treaty shall not apply to Nansei Shoto south of 29 degrees north latitude (including the Ryukyu Islands

and

and the Daito Islands), Nampo Shoto south of Sofu Gan (including the Bonin Islands, Rosario Island, and the Volcano Islands), and Parece Vela and Marcus Island as set forth in Article 3 of the Treaty of Peace with Japan signed at the city of San Francisco on September 8, 1951, as long as the present situation continues with respect to the administration, legislation and jurisdiction over those areas."

Dr. Waring stated that, with the coming into force of the Treaty of Peace, the provisions of paragraph 13 (paragraph 6 of the original draft) of the Protocol to the Treaty under discussion were no longer relevant to the Ryukyu Islands, since the United States is not a temporary military occupant of those islands but rather retains control as prescribed in Article 3 of the Treaty of Peace. Therefore, Dr. Waring added, this Protocol provision with reference to military bases and temporary military occupation was not applicable to the Ryukyu Islands. However, he indicated that the inclusion of this clause in the Treaty was considered necessary by the Department of State to meet situations arising elsewhere. Therefore, the following counterproposal was offered to the Japanese representatives for their consideration:

"Article XXIII does not apply to territories under the authority of either Party solely as a military base or by reason of temporary military occupation, or to Nansei Shoto south of 29 degrees north latitude (including the Ryukyu Islands and the Daito Islands), Nampo Shoto south of Sofu Gan (including the Bonin Island, Rosario Island, and the Volcano Islands), and Parece Vela and Marcus Island, the status of which is provided for in Article 3 of the Treaty of Peace with Japan signed at San Francisco on September 8, 1951."

Mr. Oda indicated at a later meeting that the proposed reservation, to be inserted in the Protocol in substitution of paragraph 6 of the original draft and to be numbered paragraph 13 of the final text, was acceptable to the Japanese representatives.

Mr. Oda then raised the question previously discussed between the Japanese and United States representatives concerning the special privileges Japan might desire to extend to the native inhabitants and vessels of the Ryukyu Islands (and other islands mentioned in Article 3 of the Treaty of Peace, as well as in connection with trade between those islands and Japan. Although the Japanese representatives had first indicated that a statement of understanding in the official minutes might suffice, it was now believed that a specific reservation

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in this connection should be inserted in the Protocol. However, Mr. Oda remarked, this subject could be discussed at a later meeting along with other proposed revisions to the Protocol.

Mr. Oda then stated that the Government of Japan felt strongly that some provision should be made concerning the possibility of closer trading relations between Japan and the Trust Territory of the Pacific Islands, and he proposed the insertion of the following provision in the Protocol:

> "With reference to Article XXIII, it is understood that the present Treaty shall be extended as far as reasonably practicable to the Trust Territory of the Pacific Islands."

Dr. Waring reminded Mr. Oda of the trusteeship agreement covering the former Japanese-mandated islands, and pointed out that it would be inappropriate for a Treaty of the type under discussion to bind the United States with respect to its administration of territories held in trust under the United Nations, since such a step would in effect commit the United Nations.

Mr. Oda replied that he appreciated the logic of Dr. Waring's remarks, and then suggested that a clause similar to that employed in Article XXV of the FCN Treaty between the United States and Greece (i.e., "except to the extent that the President of the United States of America shall by proclamation extend provisions of the Treaty to such Trust Territory") be inserted in the Article under discussion.

Dr. Waring stated that the inclusion of such a clause was acceptable to the Department of State if the Government of Japan so desired, and it was agreed that this phrase be inserted in Article XXIII following the words, "of the Pacific Islands".

It was then agreed that, with the revisions discussed above, Article XXIII was acceptable to both the Japanese and United States representatives.

ARTICLE XXIV

Mr. Oda stated that the Japanese representatives believed some provision should be made concerning future consultation between the two Parties regarding specific problems or suggested revisions which one Party might wish to bring to the attention of the other. He therefore proposed the insertion of the phrase, "or such request as the other Party may make for review of any provisions thereof", in paragraph 1 of this Article.

Dr. Waring replied that the proposed clause was considered to be unnecessary, inasmuch as the present text of the Treaty clearly indicates that the two countries may consult regarding "any matter affecting the

operation"

operation" of the Treaty. He added that the word "operation" did not imply that such consultation would be limited to an exchange of views on the technical aspects of the provisions of the Treaty, but rather that either Party could request such consultation whenever it believed that the Treaty was not operating satisfactorily for any reason.

Mr. Oda stated that Dr. Waring's explanation clarified the question raised by the Japanese representatives, and that the proposal to insert an additional clause in paragraph 1 was withdrawn.

It was then agreed that Article XXIV was acceptable to both the Japanese and United States representatives.

(ARTICLE XXV)
(Article XXV of the Original Draft Treaty, subsequently deleted)

Mr. Oda stated that there were no outstanding treaties and agreements between the two Parties which would be superseded by the Treaty under discussion, and that the Article should therefore be deleted. Dr. Waring replied that the Department of State had confirmed the statement made by the Japanese representatives and agreed that this Article be stricken.

ARTICLE XXV
(Previously Article XXVI of the Draft Treaty)

Mr. Oda suggested that the Treaty be formalized in Tokyo and that the ratifications be exchanged in Washington. Dr. Waring stated that this was acceptable to the Department of State, and the names of the two capitals were therefore inserted in the appropriate clauses of this Article. It was then agreed that there were no further questions in this connection and that Article XXV was acceptable to both the Japanese and United States representatives.

PROTOCOL

Mr. Oda stated that the word "Japan" should be used in all references to his country in the Treaty, and this designation was therefore inserted in the opening clause of the Protocol.

It was agreed that the word "access" in paragraph 1 of the Protocol should be deleted, and the phrase "access to the courts of justice and to administrative tribunals and agencies", substituted to conform with the revision made in paragraph 1, Article IV.

Mr. Oda stated that under the Japanese Civil Proceedings Code a larger security for costs and judgment could be required of non-residents than is usually demanded from residents, but that no discrimination against aliens was involved. He asked whether it was

understood

understood that this difference in treatment on the basis of residence was not in conflict with paragraph 1. Dr. Waring replied that, inasmuch as there appeared to be no discrimination against aliens in this connection, he could confirm the understanding of the Japanese representatives.

In connection with paragraph 2, Mr. Oda stated that it was the understanding of the Japanese representatives that, if real property owned by a Japanese company were taken by the Government for a public purpose, compensation would be made directly to the Japanese company and not to the alien who might have an indirect interest in that company.

Dr. Waring replied that the purchase by the Government of Japan of an asset of a Japanese corporation was properly a matter to be resolved by the Government and such corporation; the payment by the Japanese company to an alien of the share represented by his interest in the company was a matter of concern to the company and the interested alien.

It was agreed that the provision defining "public utility enterprise", previously discussed in connection with Article VII, was acceptable to both the Japanese and United States representatives, and it was inserted as paragraph 3 of the Protocol.

Dr. Waring made reference to a previous statement by the Japanese representatives that all mining in Japan is regarded by the Government of Japan as being on the public domain, since specific Government approval is required to exploit mining resources. Inasmuch as the phraseology employed by the Department of State in drafting paragraph 4 (originally paragraph 3) of the Protocol referred only to mining "on the public domain", without reference to privately owned mining rights in the United States, the Department desired the deletion of this phrase in order that the provision on mining might, in fact, be of mutual and reciprocal application. Mr. Oda agreed that the words, "on the public domain", should be deleted from paragraph 4.

Mr. Oda then stated, "It is the understanding of the Japanese representatives that in the event Country "A" and country "C", a third country, reciprocally granted to nationals of each other permission to engage in mining, and if country "B", a Party to the Treaty, requested Country "A", the other Party to the Treaty, to accord to nationals of country "B" the right to engage in mining in country "A" by invoking the most-favored-nation clause of paragraph 4, Article VII, country "A" was obligated to comply with such a request only on the condition that country "B" extend to nationals of country "A" the same right to engage in mining."

Dr. Waring

Dr. Waring replied that the understanding of the Japanese representatives was correct inasmuch as paragraph 4 of the Protocol specifically provided that rights to engage in mining were dependent on reciprocity. Although the most-favored-nation treatment provision of paragraph 4, Article VII, would apply, Dr. Waring added, either Party might withhold such mining rights to the extent that these are not accorded to its own nationals by the other Party.

The reservation concerning the professions of notary public and port pilot, previously discussed in connection with Article VIII, was confirmed and inserted as paragraph 5 of the Protocol.

The provision previously discussed in relation with Article XII regarding the right to impose restrictions on the introduction of foreign capital necessary to protect the monetary reserves of either Party was accepted and inserted as paragraph 6 of the Protocol.

Mr. Oda made reference to the reservation previously proposed by the Japanese representatives with respect to marks of origin, and inquired whether the Department of State had indicated its willingness to include such a reservation.

Dr. Waring replied that the Department of State deemed the insertion of such a reservation most desirable and offered the following paragraph for the consideration of the Japanese representatives.

> "With reference to Article XIV, paragraph 4, it is understood that either Party, acting in accordance with its laws, may prohibit the importation into its territory, or seize, or otherwise restrict or regulate the sale of any goods with respect to which there has been failure to comply with marking requirements established to assure that the true geographic or commercial origin of such goods is correctly represented. Furthermore, each Party agrees to take appropriate steps to prevent misrepresentations, direct or indirect, that goods produced or sold in or exported from its territory originate within the territory of the other Party or any distinctive place within such territory."

Mr. Oda stated that this proposal was acceptable to the Japanese representatives, and it was agreed that it be inserted as paragraph 7 of the Protocol.

The insertion of the paragraph concerning certain controls over the internal sale, distribution, or use of imported articles previously discussed in connection with Article XVI was confirmed, and this provision was inserted as paragraph 8 of the Protocol.

It was also agreed that the provision with respect to "screen quotas", previously discussed in connection with Article XVI, was acceptable to both the Japanese and United States representatives and was therefore inserted as paragraph 9.

The provision describing availability of means of payment as a commercial consideration, previously discussed in connection with Article XVII, was agreed upon and inserted as paragraph 10 of the Protocol.

It was agreed that paragraph 4 of the original draft of the Treaty (i.e., the reservation concerning postal services) was acceptable to both the Japanese and United States representatives, and it was retained as paragraph 11. Similarly, paragraph 5 of the original draft (i.e., the reservation in connection with Puerto Rico) was agreed upon and retained as paragraph 12 of the Protocol.

The reservation combining the text of the original paragraph 6 of the Protocol and that proposed by the Japanese representatives in connection with the Ryukyu Islands, previously discussed in relation with Article XXIII, was agreed upon and inserted as paragraph 13 of the Protocol.

Mr. Oda then made further reference to the desire of the Government of Japan to extend certain privileges solely to the native inhabitants and vessels of, and trade with, the Ryukyu Islands, without the obligation of extending similar privileges to other countries by virtue of provisions for most-favored-nation treatment. Mr. Oda also reminded Dr. Waring that the Japanese representatives had previously requested a reservation in the Protocol in connection with the right of the Government of Japan to extend to certain alien residents of Japan various privileges which they had previously enjoyed in their status as Japanese nationals, and who had acquired alien status solely as a result of Japan's renunciation of territories under the terms of the Treaty of Peace. Mr. Oda stated his Government wished to clarify that such special privileges as it might grant to these individuals would not be demanded by other aliens on the basis of most-favored-nation treatment.

Dr. Waring replied that the Department of State fully understood the problem of the Government of Japan in this connection, and believed that the following paragraph would resolve these to the satisfaction of the Japanese representatives:

> "The most-favored-nation treatment provisions of the present Treaty shall not apply with respect to those rights and privileges which may be accorded by Japan to: (a) persons who originated in the territories

territories to which all right, title and claim were renounced by Japan in accordance with Article 2 of the Treaty of Peace with Japan signed at San Francisco on September 8, 1951; or (b) the native inhabitants, vessels and products of the islands mentioned in Article 3 of the said Treaty of Peace."

Mr. Oda informed the United States representatives that this reservation was generally acceptable to the Government of Japan, but that the Japanese representatives wished to amend clause (b) to read: "the native inhabitants and vessels of, and trade with, the islands mentioned in Article 3 of the said Treaty of Peace". In explanation of this change Mr. Oda said that the original text would appear to be limited to imports from the islands, whereas the Government of Japan hoped soon to simplify both import and export procedures applicable to trade with the Ryukyu Islands and that current restrictions would be relaxed in connection with the exportation of certain commodities to the Ryukyu Islands, as well as with respect to requirements for processing contracts and compensating trade between Japan and those islands, over which Japan retains residual sovereignty.

Dr. Waring replied that the Japanese representatives undoubtedly realized that such preferential treatment with respect to Japan's exports to the Ryukyu Islands went beyond the terms of the General Agreement on Tariffs and Trade (GATT). Therefore, he added, while acceptance of the Japanese suggestion was without prejudice to the possible views of the Contracting Parties to GATT on this subject, the proposed revision was acceptable to the United States representatives. It was then agreed that this provision, as revised, be inserted in the Protocol as paragraph 14.

At a subsequent meeting (please see section entitled "Final Discussions on Negotiating Points") agreement was reached on the inclusion of an additional paragraph in the Protocol (paragraph 15) with reference to the continued application by Japan, during a transitional period of three years from the date of the coming into force of the Treaty under discussion, of existing restrictions on the purchase by aliens, with yen, of outstanding shares in Japanese enterprises.

There being no further questions, it was agreed that, with the revisions discussed above, the Protocol was acceptable to both the Japanese and United States representatives.

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FINAL DISCUSSIONS

Final Discussions on Negotiating Points

Dr. Waring opened the final discussions on the proposed Treaty with the following remarks:

"Mr. Oda, I wish to express first of all the deep appreciation of the American representatives for the splendid spirit in which it has been possible to conduct our conversations. We are grateful to your Government and to you and your colleagues for the fine attitude of co-operation which has characterized our meetings, and for your earnest efforts to understand and accommodate our point of view. We hope you feel that a similar effort has been made on our part. And we trust that you will find a continuation of that attitude in the proposals which we are about to submit for your consideration.

"We are now entering the final phases of our discussions, looking toward the early conclusion of a Treaty of Friendship, Commerce and Navigation between our two countries. These discussions have been long, detailed, intricate, technical, and exhaustive. As a result, however, we have been able to identify five negotiating points. It is my belief that agreement can be reached on these problems which will bring our discussions to a successful conclusion. In consequence, I suggest that we confine our time and attention to these major matters in order, as promptly as possible to conclude our task - one objective which I am sure we both desire. To that end, I further suggest that the time has come to discontinue attempts to foresee and prejudge the myriad hypothetic questions which an active mind may invent as potentialities under this Treaty. Unless we do this, we shall have assigned ourselves a life's work - and grave doubt arises as to whether we should finish before the grim reaper takes us to our questionable reward. I submit that a conscientious effort has been made to provide for our countrymen on both sides a full and careful documentation of our discussions. Such documentation will be found in the official minutes which Mr. Yukawa and I have signed, and in those of our more recent discussions which Mr. Adams now has in the course of preparation for your approval.

"Notwithstanding this admonition of mine, or perhaps because of it, there are two points which you have recently raised that I should like to clarify for the record. You asked whether, in our opinion, re-investment would, under the treaty, be subject to screening.

"(a) If by re-investment you mean the purchase of an interest in a new or different enterprise

with

with funds derived from the sale of equity, the answer would be yes. We would consider such an investment a new investment subject to screening.

"(b) If by re-investment you mean the utilization of profits to acquire outstanding shares of another company, the answer would also be yes - for so long a period as by mutual consent we shall agree to such a restriction on the employment of yen profits.

"(c) But if you mean by re-investment (and I do not believe you do) the utilization of profits within the enterprise of the original investment, then the answer would be no. Proprietors must be free to exercise their own best judgment as to how profits should be employed to advance their companies' fortunes whether for dividends, debt retirement, or the acquisition of capital assets.

"You have also asked whether in our opinion it is possible to divorce the right to "engage in business activities" from the right to acquire shares of stock or other proprietary interest. The answer is obviously no. It is impossible to divorce the right to operate from the right to possess. If one were denied the opportunity to acquire an interest in a company, one would certainly be denied the opportunity to engage in that business activity. Any other construction would be completely untenable and a negation of most important right which the Treaty is designed to protect.

"I should like now to turn to a consideration of the five remaining points for negotiation. I frankly believe that it will be possible to resolve these matters to our mutual satisfaction, and I turn to that task in a spirit of optimism."

Mr. Oda expressed his appreciation for the explanation given by Dr. Waring on re-investment and pointed out that, with reference to (c) above, it was the understanding of the Japanese representatives that if it were desired to acquire outstanding shares in Japanese enterprises through such reinvestment, this acquisition would, of course, be subject to screening for so long a period as by mutual consent it should be agreed that the employment of yen profits be restricted. Mr. Oda further stated that such re-investments as were mentioned by Dr. Waring in point (c), above, would also be subject to screening so long as the said re-investments involved requests for remittances in foreign currencies of principal of profits accruing therefrom.

Dr. Waring

Dr. Waring replied that Mr. Oda's understanding in connection with the acquisition of outstanding shares was correct. With respect to the second question raised by Mr. Oda (i.e., screening of re-investments involving requests for remittances in foreign currencies), Dr. Waring stated that screening of re-investment within the enterprise of the original investment would be permissible insofar as such re-investment increased the participation in equity ownership.

Mr. Oda then stated that he shared the views expressed by Dr. Waring in connection with the successful conclusion of these discussions and suggested that the first of the five points remaining for negotiation be examined. In connection with the clause in paragraph 3, Article XII, concerning remittances "in foreign exchange in the currency of the other Party", Mr. Oda read the following statement:

> "Paragraph 3 of Article XII might lead to an interpretation that, even in cases where investment is made by American nationals in a currency other than United States dollars (for example, in pounds sterling), the withdrawal of the principal of said investment or the profits accruing therefrom shall be made in United States dollars; it might also lead to an interpretation that, even in cases where remittance is destined for areas other than the territories of the United States, the said remittance shall be made in United States dollars. In order to avoid such interpretations, it is believed necessary to insert a qualifying clause in the text of the Treaty. Therefore, the Japanese representatives propose that the phraseology of paragraph 3 of Article XII reading "in foreign exchange in the currency of the other Party" be amended to read "in foreign exchange, as a general rule, in the currency of the other Party."

Dr. Waring replied that, in his opinion, the additional words "as a general rule" were unnecessary, and would tend to obscure a provision of the Treaty which should be framed as precisely as possible in the interests of Japanese and United States businessmen operating under the Treaty. Dr. Waring added that the Department of State had indicated it could not favorably consider the proposed insertion and had transmitted its views on this subject as follows:

> "Attention is invited to the statement by the United States representatives (Memorandum of Conversation, Twenty-first Informal Meeting, May 12, 1952) that, while the present inconvertibility of certain currencies persists, there would be no requirement that the earnings or dividends accruing from an investment made in some currency other than United States dollars be made available for remittance in dollars. The Department of State believes that Article XII would not preclude the application of reasonable exchange restrictions which specify the currency in which United States investors may make investments and establish the conditions for the withdrawal of capital and earnings with respect to investments

made

made in currencies other than dollars. Under these circumstances there would probably be either a clear understanding between the Japanese Government and individual investors or general, published rules as to the conversion into dollars of earnings and dividends derived from non-dollar investment. It should be noted that the possibility of an American investor desiring and being able to use sterling for his investment in Japan is rather remote. If an investor held American-account sterling, he could convert it into dollars and make a dollar investment in Japan; if he held inconvertible sterling, he would not ordinarily be permitted under sterling area regulations to transfer it to Japan. A problem might arise with respect to old investments made in Japan by Americans with non-dollar currencies. If no special restrictions existed with respect to such an investment at the time it was made, it would not seem appropriate for Japan to discriminate against it as compared with a dollar investment made by a United States resident. (This comment would also apply to any new investments made in the absence of limiting rules of the Japanese Government.) Again, the possibility of such investments having been made in inconvertible sterling seems remote. If made when sterling was convertible, it would, by definition, be the equivalent of a dollar investment.

"The Department of State is of the opinion that the provisions of the Treaty should be in terms of general principles without the inclusion of complicating details insofar as this is possible. The present provisions of Article XII require only that "reasonable provision" be made for the withdrawal of compensation, earnings, et cetera. The Department of State believes that, if circumstances arise under conditions of foreign-exchange stringency wherein a distinction between earnings from dollar investments and earnings form non-dollar, inconvertible-currency investments were appropriate and reasonable, such distinction could be made under the existing provision of Article XII. Therefore, the Department of State foresees no practical difficulty for the Japanese Government in this connection under the present wording of Article XII."

Mr. Oda stated that, in view of the further clarification of this matter by the Department of State, the Japanese representatives withdrew their proposal to insert a qualifying clause in paragraph 3, Article XII.

Mr. Oda then stated that the second point at issue involved paragraph 2, Article XVIII, which the Government of Japan considered unacceptable inasmuch as this paragraph provided that aliens engaged in enterprises competitive with Government-owned manufacturing and trading organizations would receive more favorable treatment than that

which

which the Government would accord Japanese nationals. Mr. Oda stated that, although there appeared to be no specific instances of competition between Government-owned and private enterprises which would come within the provisions of paragraph 2, Article XVIII, the Japanese representatives nevertheless believed that this paragraph would establish an obligation which the Government of Japan could not appropriately assume. He therefore proposed the deletion of paragraph 2, Article XVIII, and the renumbering of paragraph 3.

Dr. Waring replied that the Department of State regretted that the Government of Japan had found it could not fully subscribe to the inclusion in the Treaty of the paragraph in question, inasmuch as it was the purpose of this clause to prevent the possible undermining of legitimate investment which, if suddenly faced with competition from Government-owned enterprises enjoying tax concessions and other privileges, might find it difficult, if not impossible, to remain in business. Dr. Waring then made reference to a previous statement by Mr. Oda that the Japanese representatives would be willing to include in the memoranda of conversation an assurance that some protection would be afforded to private enterprises with respect to competition offered by Government-owned enterprises.

Mr. Oda stated that it could be mutually understood that neither of the Parties to the Treaty would, under normal circumstances, permit its publicly owned or controlled trading or manufacturing enterprises to operate in competition, within its territories, with privately owned and controlled enterprises of nationals and companies of the other Party in a manner detrimental to the interests of the latter, and that either Party would, upon the request of the other, enter into consultation with a view to a satisfactory adjustment of the matter or the possible relief of the party or parties affected.

Dr. Waring indicated that this statement was acceptable and agreed that paragraph 2 of Article XVIII be deleted, and that paragraph 3 of this Article be renumbered as paragraph 2.

Mr. Oda then stated that the third outstanding issue involved the desire of the Government of Japan that paragraph 2, Article VII be fully reciprocal with respect to the extent of alien participation which either Party might permit in the reserved fields of activity stipulated in that paragraph. He added that the Japanese representatives also believed that the retroactive application of new limitations, now prohibited under the terms of the second sentence of paragraph 2, Article VII, should be allowed in specific cases where the extent of alien participation originally authorized in one of the reserved fields was greater than that accorded under like circumstances by the other Party. Mr. Oda added that such a revision of the second sentence of this paragraph would permit the Government of Japan retroactively to apply new limitations in the reserved fields of activity to the extent that alien participation is restricted under the laws of the various States of the United States. He observed that such a clause concerning retroactive application could exclude banking, and thus be

inapplicable to the three United States banks presently operating in Japan.

Dr. Waring replied that, since banking was excluded, the reservation suggested by Mr. Oda with respect to the retroactive application of new limitations in certain specific instances appeared to be unnecessary, inasmuch as there were no other United States interests which would be affected. He pointed to the fact that both the Japanese and United States representatives had discussed this point for many months and had attempted to discover without success other existing United States interests in the reserved fields of activity which would receive the protection afforded by the second sentence of paragraph 2, Article VII. Dr. Waring further stated that Japan would have the right to determine the extent of alien participation in one of the reserved fields at such time as the desired investment was screened by the Japanese authorities. Therefore, he added, there appeared to be no need for the suggested retroactive application of new limitations on the basis of reciprocity between the laws of Japan and those of the individual States of the United States. Dr. Waring stated that the concept of reciprocity was acceptable to the United States representatives, and that the inclusion of a provision along such lines would probably meet the desires of the Government of Japan. He added that the Department of State, in an effort to accommodate the Japanese representatives on this point, had suggested the following provision for inclusion as the second sentence of paragraph 4 of the Protocol:

> "Furthermore, Japan shall not be obliged by the terms of that paragraph (i.e., paragraph 4, Article VII) to accord to enterprises of nationals and companies of the United States of the types mentioned in the first sentence of paragraph 2 of Article VII more favorable treatment than the State in which such national is domiciled, or pursuant to the laws of which such company is organized, accords to enterprises of nationals and companies of Japan."

At a subsequent meeting Mr. Oda stated that the proposed second sentence of paragraph 4 of the Protocol was generally acceptable, but that the Japanese representatives desired a slight revision in the text and the addition of the words "or Territory" following the clause reading, "more favorable treatment than the State". He added that the clause would then correspond more closely with other similar phrases employed in the Treaty, and would include United States nationals and companies domiciled in Hawaii and Alaska. Mr. Oda also observed that the proposed provision appeared to make no reference to United States enterprises which were incorporated under Federal law. Inasmuch as the three United States banks operating in Japan (i.e., the National City Bank of New York, the Chase National Bank, and the Bank of America) have charters as national banks, they were not properly covered by the

phraseology

phraseology proposed. Mr. Oda therefore suggested that this provision should be amended by substituting for that portion following the phrase "the first sentence of paragraph 2 of Article VII", the following wording:

> "more favorable treatment than that accorded by the State or Territory of the United States of America in which such national is domiciled, or pursuant to the laws of which such company is organized, or, in which, if such company is organized pursuant to the relevant Federal laws, such company is located, to the enterprises of nationals and companies of Japan."

Dr. Waring replied that the Department of State was ready to meet the proposal advanced by the Japanese representatives with reference to banking organizations holding charters as national banks under the Federal laws of the United States. He suggested, however, that the phrase concerning such enterprises might be somewhat improved if it were revised to read: "or in which, if such company is organized under Federal law, such company has its principal office". Dr. Waring stated that, with the various modifications previously discussed, paragraph 4 of the Protocol would read as follows:

> "4. With reference to Article VII, paragraph 4, either Party may require that rights to engage in mining shall be dependent on reciprocity. Furthermore, Japan shall not be obliged by the terms of that paragraph to accord to enterprises of nationals and companies of the United States of the types mentioned in the first sentence of paragraph 2 of Article VII more favorable treatment than that accorded by the State or Territory of the United States of America in which such national is domiciled, or pursuant to the laws of which such company is organized, or in which, if such company is organized under Federal law, such company has its principal office, to the enterprises of nationals and companies of Japan."

Mr. Oda observed that the second sentence of paragraph 4 of the Protocol did not refer to cases where the treatment in question was accorded by the Federal Government of the United States, rather than by any of its States or Territories, under relevant Federal laws. In view of past experience, however, no such case of the applicability of Federal laws to Japanese nationals or enterprises having arisen, Mr. Oda added, it was not anticipated that such situations would arise in the future.

Dr. Waring

Dr. Waring acknowledged Mr. Oda's statement and invited attention to the general principle that neither country was obliged to accord privileges or rights in the reserved fields of activity beyond the extent to which these are reciprocally accorded.

Mr. Oda stated that this provision was acceptable to the Japanese representatives, and it was agreed that paragraph 4 of the Protocol should be revised as indicated.

In connection with the fourth issue remaining for negotiation, Mr. Oda made reference to previous discussions on Japan's obligations under Article 12 of the Treaty of Peace and the relationship between this Article and the Treaty of Friendship, Commerce and Navigation. Mr. Oda pointed out that Japan might grant certain privileges to aliens under the terms of Article 12 (b) and (c) of the Treaty of Peace, which requires that Japan accord rights reciprocally to nationals of those signatory countries that declare their willingness to extend such rights to Japanese nationals. Therefore, he added, the provisions for most-favored-nation treatment under the Treaty of Friendship, Commerce and Navigation might, as a result of concessions under the Treaty of Peace, assure for United States nationals more favorable treatment in connection with the reserved fields specified in Article VII than was intended in the Treaty. Mr. Oda added that Japan would, of course, accord such most-favored-nation treatment, but that such extraordinary rights as were secured solely under Article 12 of the Treaty of Peace, and were in excess of the degree of alien participation which Japan might wish to approve in the reserved fields of activity under Article VII of the Treaty under discussion, would be withdrawn on April 28, 1956, in accordance with the terms of the Treaty of Peace. Mr. Oda therefore proposed the following additional paragraph for insertion in the Protocol:

> "It is understood that the nationals and companies of the United States of America shall, on condition of reciprocity, be accorded, until April 28, 1956, by Japan, most-favored-nation treatment as provided in the present Treaty of Friendship, Commerce and Navigation with respect to those rights and privileges, including the right to engage in enterprises reserved under Article VII, paragraph 2, which Japan may be obligated to accord to any third country in accordance with the provisions of Article 12 (b) and (c) of the Treaty of Peace with Japan signed at the City of San Francisco on September 8, 1951, or in accordance with the provisions of any treaty of peace as envisaged in Article 26 of the aforesaid Treaty of Peace."

Dr. Waring replied that, although the technical point raised in the paragraph suggested by the Japanese representatives was fully appreciated by the Department of State, the latter was of the opinion

that

that the insertion of such a paragraph in the Treaty was unnecessary. Dr. Waring added that the Department regards the Treaty under discussion as replacing Article 12 of the Treaty of Peace, by virute of the implicit terms of the latter, with reference to parallel subject matter, and placing relations between the two countries on an entirely mutual basis. Moreover, the Department does not perceive any practical advantage in attempting to preserve for United States nationals the special investment privileges under Article 12 of the Treaty of Peace during the relatively brief period between the coming into force of the Treaty of Friendship, Commerce and Navigation and the expiry of Article 12 of the Treaty of Peace. The Department of State further believes, Dr. Waring pointed out, that any special problem created by the principle of most-favored-nation treatment contained in paragraph 4 of Article VII is solved by the formula concerning reciprocity now included in paragraph 4 of the Protocol.

Mr. Oda observed that cases might arise where a United States national or company would claim the right, on the basis of the principle of most-favored-nation treatment, to participate in one of the reserved activities mentioned in Article VII to the same degree which Japan might be obligated to accord such treatment to nationals and companies of third countries under the terms of the Treaty of Peace. Thus, if such a United States national or company were domiciled or organized in a State or Territory of the United States where alien paritipation in the reserved activities was not restricted, or was restricted only to a minor degree, Mr. Oda stated, the United States investor might secure rights to participate in like activities in Japan to a greater degree than the Government of Japan would accord under normal circumstances to residents of that State or Territory or to other aliens. Mr. Oda added that Japan was willing to accord such treatment to United States nationals and companies during the period such extraordinary rights might be granted to third countries in accordance with the Treaty of Peace. It must be understood, however, Mr. Oda stated, that such rights of investment, based solely on the treatment temporarily accorded other aliens under the Treaty of Peace, and in excess of the degree of alien participation in reserved activities normally permitted by Japan, would be withdrawn on April 28, 1956, as stipulated in that Treaty, when such rights would also be withdrawn from the nationals and companies of third countries which are signatories to the Treaty of Peace.

Dr. Waring replied that he believed few, if any, cases would arise where a United States national or company would wish, under such circumstances, to secure temporary rights to invest in Japanese enterprises engaged in one of the reserved activities mentioned in Article VII. He added that, if any such cases arose, there should be a clear understanding between the appropriate agency of the Government of Japan and the United States investor concerned that permission to engage in one of the reserved activities to an extent beyond that normally accorded by Japan, and based solely on the application of the most-favored-nation principle with respect to similar rights granted to

nationals

nationals of third countries in accordance with the Treaty of Peace, would be withdrawn or reduced upon the expiry of Article 12 of the Treaty of Peace (i.e., April 28, 1956). Such an understanding, Dr. Waring added, would properly be reached between the United States investor and the appropriate agency of the Government of Japan at the time the former's application for investment was screened and approved. It should also be understood at that time, he observed, that such extraordinary rights of participation in one of the reserved activities would not be withdrawn or reduced if, for whatever reason, similar rights extended to third countries under the Treaty of Peace were not withdrawn or reduced at the appointed time (i.e., April 28, 1956).

Mr. Oda stated that this clarification of the views of the United States was satisfactory to the Japanese representatives, and that he withdrew the proposal to insert a paragraph in the Protocol along the lines indicated above.

With respect to the fifth point under negotiation, Mr. Oda made reference to previous discussions on Article VII and the desire of the Government of Japan to continue in force those provisions of the Foreign Investment Law which regulate the purchase of outstanding shares in Japanese enterprises. Mr. Oda pointed out that this law presently restricts the purchase by aliens of outstanding shares on the Japanese stock market. Although such purchases are possible, Mr. Oda added, the specific approval of the Government of Japan is required in each case, and such approval is seldom granted. He stated that Japanese business circles felt strongly that this matter should be fully clarified in the Treaty since they feared that aliens might, with a relatively modest investment acquire controlling interests in Japanese enterprises. Mr. Oda stated that Japanese bssinessmen believed that the present undervaluation of outstanding shares in Japanese enterprises, resulting in part from the disparity between their modest equity capital and total assets resulting from extensive credit and currency deflation, would be resolved within a period of three to five years. In view of the desire of Japanese businessmen, the appropriate agencies of the Government had decided it was necessary to continue the existing restrictions of the Foreign Investment Law for three years from the date of the coming into force of the present Treaty. Mr. Oda therefore suggested that a reservation in connection with investment be inserted in the Protocol to the effect that the pertinent restrictions contained in the Foreign Investment Law should be retained for a period of three years.

Dr. Waring replied that the Department of State was willing to accommodate the Japanese representatives in this connection, and proposed the following provision as paragraph 15 of the Protocol:

> "During a transitional period of three years from the date of the coming into force of the present Treaty, Japan may continue to apply existing restrictions on the purchase by aliens, with yen earnings, of outstanding shares in Japanese enterprises."

Mr. Oda

Mr. Oda pointed out that the phrase "with yen earnings" was too narrow in scope to meet the point raised by the Japanese representatives, inasmuch as it was possible for aliens to acquire yen in Japan by inheritance, the sale of capital shares in other enterprises, and in several ways in addition to "earnings". He therefore proposed that this word be deleted, leaving only the phrase "with yen". He questioned the need for the latter phrase, however, pointing to the fact that outstanding shares could actually be purchased on the Japanese stock market only with yen. In this connection, Mr. Mori read the following statement of the position of the Government of Japan:

> "The Japanese side desires not to amend the law concerning Foreign Investment currently in force for the period of three years. According to the proposal made by the United States side, Japan may apply restrictions on the purchase by aliens of outstanding shares in Japanese companies in case such purchase is made with yen currency, but Japan may not apply such restrictions in case such purchase is made with yen currency converted from foreign currencies. The United States side has explained, in this connection, that Japan may apply such restrictions in the latter case by involving the provision of paragraph 6 of the Protocol (screening provision).
>
> "However, the explanation which has been given by the United States side on the said paragraph 6 of the Protocol is that such screening provision may be invoked in order to apply restrictions on the introduction of foreign capital which involves the request for remittance of its principal or profits accruing therefrom, but the said screening provision cannot be invoked in case the investment made in foreign currency does not involve request for remittance. If so, Japan cannot apply restrictions on the purchase by aliens of outstanding shares in Japanese companies with yen currency converted from foreign currencies which does not involve a request for remittance. Accordingly, the Law concerning Foreign Investment has to be amended along this line. It is proposed, therefore, that the phrase "with yen" in paragraph 15 of the Protocol be deleted."

Dr. Waring made reference to that portion of the statement quoted above reading, "If so, Japan cannot apply restrictions on the purchase by aliens of outstanding shares in Japanese companies with yen currency converted from foreign currencies which does not involve a request for remittance". He stated that the Japanese representatives had correctly interpreted the remarks of the United States representatives with reference to the application of the "screening" provision of paragraph 6 of the Protocol solely in connection with the safeguarding of monetary reserves. It was incorrect, however, to say that the Government of Japan could not control the purchase by aliens of outstanding shares with yen converted from foreign currencies. Dr. Waring added that the deletion of the word "earings" was acceptable to the United States representatives, and that the remaining phrase, "with yen", applied to

yen

yen from whatever source. Therefore, he concluded, purchases of outstanding shares with yen converted from foreign currencies, as mentioned in the statement of the Japanese representatives, could be restricted by the Government of Japan in the same fashion as could purchases of such shares with yen from all other sources.

Mr. Oda again questioned the need for the phrase "with yen" stating that it would appear less confusing if this were to be deleted, leaving the concluding clause of the proposed paragraph to read simply, "on the purchase by aliens of outstanding shares in Japanese enterprises".

Dr. Waring replied that, although it might appear to be redundant from a technical point of view, the phrase "with yen" would actually clarify this provision for the Japanese and United States users of the Treaty in the future. He pointed out that investment by aliens, presumably arising form the introduction of foreign currencies, as well as skills, technological assistance, et cetera, was already properly covered in Article VII and in other provisions of the Treaty. Hence, he added, the insertion of another restriction concerning the acquisition of outstanding shares would confuse businessmen of both countries, unless the main intent of this restriction, that is, control over purchases with yen accumulated by an alien in Japan, were made evident. Dr. Waring therefore suggested that the words, "with yen", remain in this provision in the interest of clarity. In this connection, Dr. Waring confirmed the understanding of the Japanese representatives that the term "outstanding shares", as used in paragraph 15 of the Protocol, meant stock or proprietary interest in a juridical person established under Japanese laws and regulations, excluding these the acquisition of which created additional assets of the juridical person concerned.

Mr. Oda stated that the explanation given by Dr. Waring was satisfactory to the Japanese representatives and that the insertion of the proposed paragraph, as quoted above, without the word "earnings", was acceptable. It was therefore agreed to insert this provision as paragraph 15 of the Protocol.

Dr. Waring made reference to the clarification by the United States representatives that the phrases "reasonable provision" and "in foreign exchange of the currency of the other Party" as used in Article XII would, under conditions of foreign-exchange stringency, permit the Government of Japan to distinguish between earnings from dollar investments and those from nondollar, inconvertible-currency investments. He also referred to the agreement reached on paragraph 15 of the Protocol. Dr. Waring then stated that the United States representatives believed that, to ensure the reasonable and nondiscriminatory application of the Treaty under discussion, it should be clarified that interests of United States nationals, whether individuals, branch offices, or domestic corporations owned by United States nationals, which were established in Japan prior to the enactment of the Foreign Investment Law, with investments in the type of activities provided for in that law, would be granted uniform treatment with those established under the terms of this law with respect to the remittance of earnings under the Foreign Exchange Control Law. All such remittances, however, would necessarily be subject to the foreign exchange position of Japan. Dr. Waring therefore

requested

requested that the Japanese representatives confirm the understanding of the United States representatives that the Government of Japan intends to assure uniform treatment of old and new investments with respect to conversion and remittance of earnings.

Mr. Oda replied that the Japanese representatives confirmed the understanding of the United States that the Government of Japan intends to assure uniform treatment of old and new investments, as outlined by Dr. Waring, with respect to conversion and remittance of earnings.

Mr. Oda then stated that there were no further points for negotiation on the part of the Japanese representatives, and proposed that the present and revised text of the Treaty of Friendship, Commerce and Navigation be accepted as final. Dr. Waring replied that the proposed Treaty was acceptable to the Department of State and agreed that the current text was ready for formal signature by the representatives of both Governments. Mr. Oda stated that the Ministry of Foreign Affairs would undertake to prepare the Treaty in both the English and Japanese languages for signature at the earliest possible date.

Dr. Waring thanked Mr. Oda and his fellow representatives of the Government of Japan for the keen interest and friendly cooperation evidenced throughout the several rounds of discussions, and stated that, as a result of the sincere efforts made by both groups of representatives, the approved Treaty was excellent, and would contribute materially to the continued friendly relations between Japan and the United States.

Mr. Oda expressed his appreciation to Dr. Waring and the other United States representatives for the good will and genuine understanding of Japan's problems demonstrated throughout the discussions. He added that he was particularly gratified to have contributed to the successful conclusion of Japan's first major Treaty of this type in the postwar period, and that, like Dr. Waring, he believed the Treaty to be a good one which would cement even more strongly the friendship which prevails between the two countries.

/s/ Takio Oda

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(Note: This unofficial Index follows the Article and paragraph numbering of the final text as signed. This numbering does not always coincide with that of the original negotiating draft (the US "standard"), which formed the basis of discussion notably during the "informal" round of discussions (tab "A"). The changes in numbering include the following: The first Article was dropped, and Articles II-V were each advanced one number accordingly. A new Article V was formed by transfer of VI(4) and X(2); and Article XXVI became XXV. The remaining Article numbers were undisturbed; but there were some rearrangements in paragraphing, to wit: A new sub (b) was inserted in I(1). In VI, 5 became 4. In IX, 1 and 2 were consolidated, 4 became 2, and 5 became 4. In XII, 6 was dropped. In XVIII, 2 was dropped, and 3 became 2. In XIX, a new 6 was formed by transfer from end of 3, and 6 accordingly became 7. In the Protocol, 3 became 4, 3-bis became 7, 4 became 11, 5 became 12, and 6 became 13. In a few instances material in the minutes is not referenced to a specific provision, although indexed according to the numbered provision to which it in fact relates.

The minutes cover two rounds of conversations: First, the "informal" discussions which were written up in a series of 21 memoranda; and, second, the final discussions and negotiations which were written up in a single consolidated memo. They are identified in this Index as "A" and "B", respectively. The latter contain, inter alia, corrections of certain errors appearing in the former.)

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